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No. 13218.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAS VEGAS MERCHANT PLUMBERS ASSOCIATION, MERCHANT PLUMBERS EXCHANGE, INC., A. R. RUPPERT PLUMBING & HEATING COMPANY, UNITED PLUMBING AND HEATING COMPANY, A. R. RUPPERT, JOE DAVIS, RUBEN COHEN, JACK HYNDS, DON MCGARVIE and BERNARD V. PROVENZANO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From Judgments of Conviction of the United States District Court, District of Nevada.

OPENING BRIEF OF APPELLANTS.

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TOPICAL INDEX.

PAGE

PAGE

XV.

XVI.

XVII.

TABLE OF AUTHORITIES CITED.

PAGE

PAGE

STATUTES

TEXTBOOKS

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UNITED STATES OF AMERICA,

Appellee.

Appeal From Judgments of Conviction of the United States District Court, District of Nevada.

OPENING BRIEF OF APPELLANTS.

Statement of Pleadings and Facts Disclosing Jurisdiction.

Appellants, Las Vegas Merchant Plumbers Association, Merchant Plumbers' Exchange, Inc., A. R. Ruppert Plumbing & Heating Company, United Plumbing and Heating Company, A. R. Ruppert, Joe Davis, Ruben Cohen, Jack Hynds, Don McGarvie and Bernard V. Provenzano were indicted, together with Ralph Alsup, for conspiring to suppress and eliminate competition in the sale and distribution of plumbing and heating supplies in Southern Nevada. [Tr. p. 3.]

All of the individual defendants named herein are residents of, and have their principal places of business in, Las Vegas, Nevada. The defendant, Merchants Plumbers Exchange, Inc., is a Nevada corporation with its principal place of business in Las Vegas, Nevada, and the Las Vegas Merchant Plumbers Association is an unincorporated association with its principal place of operation in Las Vegas, Nevada.

The indictment herein alleged that all of said defendants were in violation of Section 1 of the Sherman Act (15 U. S. C. A., Sec. 1). The pertinent portion of the cited Statute provides as follows:

> "Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal."

Motions were made on behalf of all defendants to dismiss the indictment for failure to state facts sufficient to constitute a violation of the Sherman Act, but such motions were denied. [Tr. p. 26.]

A motion for continuance on behalf of all defendants other than defendant Ralph Alsup was made on the ground that counsel for said defendants had been retained for trial only a few days before the trial date and had not had an opportunity to become familiar with the facts of the case [Tr. pp. 39-52], but the motion was denied. [Tr. p. 53.] A motion was made for a transcript of the grand jury proceedings which preceded the bringing of the indictment, but said motion was denied. [Tr. p. 34.]

The matter was tried by a jury at Carson City, Nevada, following which motions were made on behalf of all defendants for judgments of acquittal, which motions were

denied except for the motion as to defendant James Humphrey, which was granted. [Tr. pp. 55-57.] All defendants other than said James Humphrey, were found guilty. [Tr. pp. 146-151.]

This appeal is taken pursuant to Rule 37, Federal Rules of Criminal Procedure, on behalf of appellants herein. Defendant, Ralph Alsup, is appealing from said judgment in a separate appeal.

A motion for a new trial on newly discovered evidence on behalf of appellants herein was made, but this motion was denied by the Trial Court on October 7, 1952. (Supplemental Designation of Record; Stipulation and Order for original papers and proceedings of said new trial motion.)

Statement of the Case.

Appellants were indicted under the Sherman Act, charging a violation of that Act by means of a conspiracy among the defendants to suppress and eliminate competition in plumbing and heating supplies. The indictment alleged, for purposes of Federal jurisdiction, that substantial quantities of plumbing and heating supplies were purchased from out-of-state sources and shipped into Nevada; that such supplies were either shipped directly to plumbing contractors in Nevada, or to wholesalers of plumbing and heating supplies who purchase their materials in response to prior orders placed with them by plumbing contractors, and to whom said supplies are immediately delivered when they are received; that substantial quantities of plumbing and heating supplies are shipped from out-of-state sources directly to the job site where they are installed by plumbing contractors in Nevada; and that appellants are conduits through which

plumbing and heating supplies manufactured in other states move in a continuous and uninterrupted stream to their places of installation within Nevada.

The indictment further charges appellants, together with defendant, Ralph Alsup, of having conspired to establish an organization which would retain a common estimator who would fix prices for use by plumbing contractors; that the price as determined by the common estimator would then be submitted by the particular plumbing contractor to whom the job had been "allocated" by a so-called Allocation Committee which was set up by appellants; that thereafter plumbing contractors, other than the person to whom the job had been so "allocated," would submit higher bids in ostensible competition, and that compliance with this scheme was to be maintained by defendant Ralph Alsup, who would use his position as business agent of the union having jurisdiction over plumbers to induce qualified workmen not to work on any job other than the one which had been "allocated," as aforesaid.

The indictment then charged that the purpose, intent and necessary effect of this combination was to directly, unreasonably, arbitrarily and unlawfully restrain and obstruct the flow of plumbing and heating supplies in interstate commerce into Southern Nevada.

The testimony produced by the Government to sustain the charge of a conspiracy consisted of several persons who, had such conspiracy existed, were admittedly unindicted co-conspirators. None of these witnesses were able to testify from their own knowledge and observation that the so-called "allocation committee" was ever established; the evidence adduced was to the effect that such a commitee was supposed to have been or was "understood to have been" established. [Tr. pp. 560, 823, 939.]

With respect to the issue of adhering to the prices set by a common estimator employed by the Association, each of the Government witnesses testifying as to this issue admitted that there was no compulsion to adhere to such prices and, on the contrary, that the general practice was to submit bids other than those suggested by the common estimator. [Tr. pp. 577, 680, 816, 957-958.]

With respect to the method of enforcing the so-called conspiracy by withholding qualified labor from the plumbing contractor who did not adhere to the alleged conspiracy, all but one of the government witnesses testified that he had never experienced any difficulty in obtaining qualified labor even though he did not adhere to the price suggested by the common estimator. The sole government witness testifying in support of this issue recounted a solitary instance, and grave doubt was cast upon his interpretation and veracity because the facts as related by this witness lent themselves equally well to appellants' interpretation, which involved a dispute between the witness and the union as to the time when the union contract permitted the witness to begin his working day. [Tr. pp. 778, 1086, 1274-1292, 1294-1296.]

The portions of the indictment dealing with the subject of interstate commerce were sought to be substantiated by two groups of witnesses; one group to establish that supplies were shipped from outside of the State of Nevada into the State of Nevada as purchased by plumbing contractors, and one group representing the wholesalers of plumbing and heating supplies.

The witnesses who testified that supplies were purchased by Nevada plumbing contractors from out-of-state sources submitted voluminous exhibits to establish the truth of this claim. None of these witnesses, however, were able to

testify with any certainty as to the duration of time such goods spent on the shelves of the plumbing contractors purchasing these supplies and, in fact, those who ventured a statement with respect to this issue, testified that plumbing and heating supplies, almost without exception, remained on the shelves of plumbing contractors for lengthy and varying periods of time before their final use. [Tr. pp. 476, 584-585, 620, 1074, 1081.]

These witnesses further testified that in every instance plumbing and heating supplies were processed in one way or another and joined together with other such supplies during the process of their installation and prior to their sale, as a completed plumbing or heating unit, to the public. [Tr. pp. 392, 447, 572, 586, 943-944, 1075, 1232.]

With respect to the issue of shipments from out-of-state sources directly to the job site where a particular plumbing contractor installed them on the premises, only two specific items were adduced from government witnesses in contrast to the allegation that "substantial quantities" of plumbing and heating supplies were so distributed. Of these two items one was shipped to the job site for a plumbing contractor who was not a defendant in the action, and the total amount of these shipments amounted to 2% of the sales of the purchases of that particular plumbing contractor for the year in question [Tr. pp. 623-624, Govt. Ex. No. 79], the other shipment for which there was direct testimony was on the order of a plumbing contractor from Los Angeles, California, and an unstated portion of this shipment was made prior to the period of the indictment. [Tr. pp. 994-995, Govt. Ex. No. 4.]

With respect to the witnesses testifying on behalf of wholesalers and plumbing and heating suppliers, two of

such wholesalers were represented. Testimony on behalf of one of said wholesalers casts no light at all upon the issues in the indictment. [Tr. pp. 588-602.] The testimony on behalf of the other wholesaler failed completely to substantiate the indictment since the testimony was that only 7.3% of the total purchases of his company were in response to prior orders from plumbing contractors, and that even with respect to this small percentage an unspecified but substantial percentage was never, in fact, thereafter delivered to the contractor ordering the goods. [Tr. pp. 469, 470, Govt. Ex. No. 38.]

Once again this Government witness also testified that invariably, insofar as his records showed, plumbing and heating supplies from out-of-state sources remained on the shelves of either the wholesaler or the contractor for a substantial length of time. [Tr. pp. 476, 1074.]

The testimony on behalf of appellants with respect to the so-called conspiracy to suppress competition, as alleged in the indictment, was to the effect that an Association had, in fact, been formed by plumbing contractors in Southern Nevada for the purpose of discussion and action for their mutual self-interests in connection with the plumbing and heating business; that an estimator was, in fact, employed by such Association for the mutual benefit of the Association members; that it was the function of such estimator to compute estimates on any job submitted to him for computation and that the results of this computation would be made known to persons interested in bidding for the particular job. [Tr. pp. 1155-1160.]

Appellants' witnesses denied, however, as had the Government witnesses, that there was any compulsion to use the price as fixed by the common estimator and testified that the practice rather was to use such figure as a guide in making their own independent bids which varied from the price suggested by the common estimator in a far greater number of cases than it coincided with such suggested price. [Tr. pp. 1160-1185, 1267-1270.]

It was further appellants' position that there was no continuous and uninterrupted flow of commodities from outside of the State of Nevada to their places of installation and use within the State of Nevada, as alleged in the indictment, but rather that any goods purchased from out-of-state sources remained on either the shelves of plumbing contractors or wholesalers for substantial periods of time, and that such goods were thereafter commingled with other goods before finally being installed. [Tr. p. 1152.] Testimony was further adduced by appellants to indicate that they were not selling plumbing and heating supplies in the form in which they had been imported from out-of-state sources but rather were selling completed plumbing and heating systems to the ultimate consumer, which systems were a combination of many different plumbing and heating items which were fabricated and processed in various ways before being joined into the completed system. [Tr. pp. 1152-1153.]

Specification of Errors.

I.

The Trial Judge erred in denying appellants' motions to dismiss the indictment on the ground that insufficient facts were alleged to state a caues of action under Section 1 of the Sherman Anti-Trust Act.

Motions to dismiss. [Tr. pp. 212-258.] Motions denied. [Tr. p. 316.]

II.

The Trial Court committed prejudicial error in charging the jury that a conspiracy to fix prices standing alone constituted a violation of the Sherman Anti-Trust Act, since there was omitted completely from such charge the requirement that such conspiracy in intent, purpose or necessary effect have some substantial effect upon interstate commerce.

The Trial Court's instructions providing that a conspiracy to fix prices, irrespective of the effect of such conspiracy upon interstate commerce, constitutes a violation of the Sherman Anti-Trust Act, are to be found in Instructions Numbers 18, 19, 20 and 22. [Tr. pp. 122-126.]

Requested instructions on behalf of defendants which were erroneously rejected by the Trial Court dealing with this subject matter are:

Instruction No. 11 [Tr. p. 67];
Instruction No. 12 [Tr. p. 68];
Instruction No. 14 [Tr. pp. 69-70];
Instruction No. 15 [Tr. pp. 71-72];
Instruction No. 18 [Tr. pp. 75-76];
Instruction No. 21 [Tr. pp. 77-78];
Instruction No. 22 [Tr. p. 79];
Instruction No. 55 [Tr. pp. 100-101].

III.

The Trial Judge committed prejudicial error in charging the jury that the fact that movement of commodities in interstate commerce has come to a halt is a completely immaterial factor not to be considered by them.

The instruction which charged the jury that the movement of commodities is an immaterial factor is to be found in Instruction No. 26. [Tr. pp. 130-131.]

Defendants requested certain instructions which would have charged the jury with the fact that plumbing and heating materials having come to rest upon the shelves of contractors or wholesalers was a factor to be considered by the jury in determining whether the goods were in fact in interstate commerce, are to be found in defendants' Requested Instructions Nos. 16, 17, 18, 19 and 21. [Tr. pp. 72-78.]

IV.

The Trial Court committed prejudicial error in omitting from its instructions any reference to the necessity of the jurors finding that the conspiracy alleged must be proved beyond a reasonable doubt to have been in purpose, intent or necessary effect a direct, substantial, unreasonable, arbitrary and unlawfully restrained obstruction of interstate commerce.

A number of instructions were requested by defendants which would have charged the jury with respect to the issues set forth in the above Specification of Error but no such instruction was given. See defendants' Requested

Instruction No. 10 [Tr. pp. 66-67];
Instruction No. 11 [Tr. p. 67];
Instruction No. 12 [Tr. p. 68];
Instruction No. 14 [Tr. pp. 69-70];

Instruction No. 15 [Tr. pp. 71-72];
Instruction No. 17 [Tr. pp. 73-74];
Instruction No. 22 [Tr. p. 79];
Instruction No. 24 [Tr. pp. 80-81];
Instruction No. 25 [Tr. pp. 81-82];
Instruction No. 26 [Tr. pp. 82-83];
Instruction No. 27 [Tr. pp. 83-84];
Instruction No. 52 [Tr. pp. 98-99];
Instruction No. 53 [Tr. pp. 99-100];
Instruction No. 55 [Tr. pp. 100-101].

V.

The Trial Court committed prejudicial error by reason of its failure in its Instructions to the Jury to charge that it was the jurors' function to apply the facts presented to the law as given in ultimately determining whether the alleged conspiracy was in purpose or effect a sufficiently direct and substantial burden upon interstate commerce so as to constitute a violation of the Sherman Act.

Instructions given by the Trial Court which required a finding by the jury of a violation of the Sherman Act upon the finding of certain facts as set forth by the Court are as follows:

Instruction No. 18 [Tr. pp. 122-123];
Instruction No. 20 [Tr. p. 125];
Instruction No. 21 [Tr. pp. 125-126];
Instruction No. 22 [Tr. p. 126];
Instruction No. 23 [Tr. p. 127];
Instruction No. 25 [Tr. pp. 128-130].

VI.

The Trial Court committed prejudicial error in refusing to instruct the jury in any singular particular with respect either to appellants' theory of the case or with respect to the converse of any of the instructions given.

Although nearly all of the defendants' Requested Instructions set forth their theory of the case, all of which were rejected by the Trial Court, the following defendants' Requested Instructions set forth the basic view of the law by appellants:

Instruction No. 10 [Tr. p. 66];
Instruction No. 12 [Tr. p. 68];
Instruction No. 13 [Tr. pp. 68-69];
Instruction No. 16 [Tr. pp. 72-73];
Instruction No. 17 [Tr. pp. 73-74];
Instruction No. 18 [Tr. pp. 75-76];
Instruction No. 19 [Tr. p. 76];
Instruction No. 22 [Tr. p. 79];
Instruction No. 24 [Tr. pp. 80-81];
Instruction No. 25 [Tr. pp. 81-82];
Instruction No. 26 [Tr. pp. 82-83];
Instruction No. 27 [Tr. pp. 83-84];
Instruction No. 53 [Tr. pp. 99-100].

VII.

The evidence does not substantiate the allegations in the indictment with respect to the existence of an interstate flow of commodities, nor is the evidence with respect to interstate commerce sufficient to sustain the judgment.

VIII.

The evidence is insufficient to sustain the allegation in the indictment that a conspiracy to violate the Sherman Anti-Trust Act existed among appellants.

IX.

The Trial Court committed prejudicial error in admitting testimony pertaining to a conspiracy without *prima facie* proof of such conspiracy apart from such co-conspirators' testimony.

X.

The Trial Court committed prejudicial error in stating in the presence of the jury during the course of the trial that the evidence theretofore submitted demonstrated that a conspiracy had been proved.

The remarks of the Trial Court referred to in this Specification of Errors are to be found in the Transcript at pages 537-538 and 764-765.

XI.

The Trial Court committed prejudicial error in instructing the jury with respect to the presumption of innocence.

The instructions given by the Court which erroneously set forth the law with respect to the presumption of innocence are Instructions Numbers 4, 5, 6 and 8. [Tr. pp. 115-117.]

XII.

The United States Attorney was guilty of prejudicial misconduct in his closing argument to the jury in re-

ferring to the nature of the punishment for the offense for which appellants were on trial.

The statements referred to in this Specification of Error are to be found in the Transcript at pages 1450-1451.

XIII.

The United States Attorney committed prejudicial misconduct by referring in his closing remarks to evidence allegedly known by him in his official capacity but which was not introduced into or contained in the record.

The statements referred to in this Specification of Error are to be found in the Transcript at pages 47-48 and 1464-1465.

XIV.

The Trial Court erred in refusing to grant appellants' motion for a continuance.

The motion for continuance was made on the grounds set forth in the Transcript at pages 39-46, but the motion was denied. [Tr. pp. 323-324.]

XV.

The Trial Court committed reversible error by its hostile treatment of appellants' counsel, by its rulings prejudicially in favor of appellee, and by its interference with the full presentation of appellants' defense.

The hostile treatment by the Trial Court which is here specified as error is to be found in the Transcript at pages 682-683, 764-766, and 1032-1033.

Rulings by the Trial Court prejudicially in favor of appellee cited here as Specification of Errors are to be found in the Transcript at pages 535 and 1089-1090.

Limitations by the Trial Court upon the full presentation of appellants' theory of defense as compared with the Trial Court's laxity in permitting the Government to present its theory, which conduct is here cited as Specification of Error, are to be found in the Transcript at pages 424-426 and 427-428.

XVI.

The Trial Court committed reversible error in denying appellants' motion to inspect the Grand Jury Minutes.

The motion to inspect the Grand Jury Minutes was timely made but denied by the Trial Court. [Tr. p. 30.]

XVII.

The Trial Court committed reversible error in denying appellants' motion for new trial upon newly discovered evidence.

ARGUMENT.

I.

The Trial Judge Erred in Denying Appellants' Motions to Dismiss the Indictment on the Ground That Insufficient Facts Were Alleged to State a Cause of Action Under Section I of the Sherman Antitrust Act.

A. The Trial Court Failed to Distinguish Between Intrastate and Interstate Commerce in Denying the Motions to Dismiss the Indictment.

Despite the tremendous expansion which has taken place in recent years in the concept of the jurisdiction of the Federal Government over trade and commerce, the fact still remains that the United States is a Federal system of government. The problem of demarcation between Federal and State autonomy is not an easy one, yet so long as we adhere to our present governmental structure a reasonable and realistic line of separation must always be sought.

> "The general rule with regard to the respective powers of the national and the state governments under the Constitution, is not in doubt. The states were before the Constitution; and, consequently, their legislative powers antedated the Constitution. Those who formed and those who adopted that instrument meant to carve from the general mass of legislative powers then possessed by the states, only such portions as it was thought wise to confer upon the Federal Government; and in others that there should be no uncertainty in respect of what was taken and what was left to national powers of legislation were not aggregated but enumerated—with the result that that which was not embraced by the enumeration re-

mained vested in the states without change or impairment."

Carter v. Carter Coal Company, 298 U. S. 238, 294 (1935).

"It may not any longer be doubted that the power of Congress and the scope of the Sherman Act's coverage 'extends to those activities intrastate which so affect interstate commerce, or the assertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.' It remains true, however, that the distinction between intrastate and interstate commerce still exists; that 'it is the effect upon the interstate commerce or its regulation, regardless of the particular form which the composition may take, which is the test of federal power;' and that the question of whether the effect on interstate commerce is substantial is still a determining one."

Atlantic Company v. Citizens Ice and Cold Storage Company, 178 F. 2d 453 (C. C. A. 5th, 1949) (cert. denied, 339 U. S. 953).

B. It Is Clear From the Indictment on Its Face That Appellant Plumbing Contractors Are Engaged in the Sale, Distribution and Installation of Fabricated Plumbing and Heating Systems Rather Than the Resale or Distribution of Any Specific Item of Plumbing or Heating Supplies.

At the outset of the discussion as to the sufficiency of the indictment it is necessary to know precisely the business activities of defendant plumbing contractors. Naturally all of the averments of the indictment are to be taken as true for the purposes of this point on appeal.

The keystone of the entire indictment is contained in Section 8 under the heading "Definitions," in which it is set forth the definition of the term "plumbing and heating supplies," which is employed over and over again. As there defined, we are to understand that whenever the term "plumbing and heating supplies" appears in the indictment it is deemed to mean "the various commodities which are customarily installed in residential, commercial and other buildings by skilled labor *as a part of plumbing or heating systems . . .*" Unequivocally, therefore, the indictment refers not to dealers in specific items but to persons engaged in the business of fashioning commodities in combination with other commodities, and with the addition of skilled labor, into systems of plumbing and heating facilities.

Section 10 of the indictment under the heading "Definitions" states that the term "plumbing contractors" when used in the indictment shall be deemed to mean those persons who are engaged in the business of distributing, selling, installing, altering and repairing the "plumbing and heating supplies" as theretofore defined.

To bolster the definitions as given and to indicate that this is not a mere chance use of words, the balance of the indictment reveals that wherever the business or activities of appellant plumbing contractors is mentioned, the word "installation" is joined in the conjunctive with the distribution and sale of plumbing and heating commodities. That this is clearly the Government's theory appears in the argument of the United States District Attorney in opposition to the motions to dismiss the indictment, in which he distinguished the business of retail sales from the business activities of appellant plumbing contractors [Tr. p. 264], and in which he referred to

the business activities of appellant contractors as the "installing, fabricating, processing, whatever you want to call it, the completed plumbing system." [Tr. p. 294.]

The question arises at the outset, therefore, as to whether the appellant plumbing contractors, who the indictment claims are in the business of the construction of plumbing and heating systems, are subject to the provisions of the Sherman Act by reason of the specific agreement between them set forth in paragraph 19 of the indictment. Each of the subdivisions contained within that paragraph refers specifically to the activities of the appellant plumbing contractors around the production of the plumbing or heating system for particular jobs. Thus:

> Subdivision A refers to the employment of an "estimator" who shall determine prices for use by contractors in their submission of bids *for the plumbing or heating system;*
>
> Subdivision B refers to the submission of plans to the estimator and his subsequent determination of a price to be charged *for the plumbing or heating system;*
>
> Subdivision C charges the adoption by the appellant plumbing contractors of the said price in submitting a bid *for said plumbing or heating system;*
>
> Subdivision D charges a selection of one of the plumbing contractors as the contractor to submit the lowest bid *for such plumbing or heating system;*
>
> Subdivision E charges that plumbing contractors other than the one so designated would then submit factitious bids setting forth higher prices than those

in the bid of the designated plumbing contractor *for the plumbing or heating system;*

Subdivision F charges that appellant Ralph Alsup, as business representative of the Association of Journeymen Plumbers, would induce qualified plumbers not to work on any job other than the one designated as aforesaid; and

Subdivision G charges that the appellant plumbing contractors would boycott and threaten to boycott wholesalers of plumbing and heating items (as the term wholesalers is defined in paragraph 9 of the indictment) if they sold or offered to sell such items at prices and on terms not agreeable to the appellant plumbing contractors.

A well-known case has already considered the precise problem here set forth, in a long and carefully considered opinion by Judge Yankwich. (*United States v. San Francisco Electrical Contractors Association,* 57 Fed Supp. 57 (S. D. Calif., 1944).) The indictment in that case was also brought under Section I of the Sherman Anti-trust Act, and but for the fact that it referred to electrical contractors rather than plumbing contractors, the allegations were almost identical. The charge was there also made that a system of factitious bids was arrived at and that only members of the Association would be able to find qualified employees for construction jobs. The Trial Judge reviewed carefully cases on interstate commerce which had been decided up to that time and granted the defendants' motions to dismiss the indictment. An important part of the Court's reasoning in so ruling was the fact that the defendants there were engaged not in the sale or distribution of commodities which had reached

them in the flow of interstate commerce, but, rather, that the defendant electrical contractors were in fact engaged in the business of fabricating completed electrical systems which made use of such items, but which represented an aggregated arrangement only after the addition of skill and knowledge to their arrangement.

> "But the contractors *did not sell* electrical supplies to the public or to general contractors. They built what the indictment calls 'electrical systems,' which it defined as 'that combination of electrical equipment by which electric current is carried into and distributed to residences, apartment houses, and other types of buildings within the San Francisco Bay area' . . .
>
> "When [the electrical contractor] bids on a job, he agrees to install an electrical system. His charges are for the completed system. Into the making of his price go electrical articles, cost of the labor of others, his own engineering skill in installing the various parts and combining them into a working whole, his own cost of doing business, and his profit of management.
>
> "In other words, the electrical contractor processes the electrical article, into a combination, which he sells at a price in which enters *as only one of the elements* the price of the article." (57 Fed. Supp. at p. 65.)

It is within the framework of this picture of appellants' business activities that the allegations in the indictment with respect to the interstate shipment of the commodities used by appellants in fabricating the plumbing and heating systems must be viewed.

It is alleged in paragraph 14 of the indictment that appellants purchased more than 40% of all their supplies from out-of-state manufacturers and wholesalers. Paragraph 15 recites that the remainder of their supplies are purchased by appellant contractors from Nevada wholesalers, who in turn purchase their supplies from out-of-state sources; it is further alleged in this paragraph that the said Nevada wholesalers purchased substantial quantities of such supplies from out-of-state sources "in response and pursuant to prior orders placed with said wholesalers by plumbing contractors" and said supplies were immediately delivered to the plumbing contractors who ordered the items.

With respect to the allegations thus made, it is clear that all of the commodities referred to find their destination either in the business establishment of the appellant plumbing contractors or on the shelves of Nevada wholesalers who hold them subject to resale to unspecified plumbing contractors. Under the holding of *United States v. San Francisco Electrical Contractors Association, supra,* there should be no question that these items destined for fabrication and commingling with other items in plumbing and heating systems are not themselves sold by appellant plumbing contractors. Even assuming a specific prior order by a plumbing contractor of specific commodities from an out-of-state manufacturer, the allegations of the indictment contained in paragraph 15 go no further than the plumbing contractor. The indictment is silent so far upon the manner by which any such item ordered by a plumbing contractor finds its way to the ultimate consumer. In view of the fact that an indictment must be read as a whole, giving effect to each part thereof, and even assuming the most favorable view of

the facts for the purpose of testing the sufficiency of this indictment, all such items of plumbing and heating supplies must be joined with others and with the labor of skilled artisans in constructing within a particular job site a completed fabricated functioning plumbing or heating system.

The section of the indictment which comes closest to alleging a direct line between an out-of-state source and an ultimate consumer is that contained in paragraph 16. It is there alleged that substantial quantities of plumbing and heating supplies are shipped directly from out-of-state sources to the "job site or place *where the same are installed* by plumbing contractors in Southern Nevada." Even here, however, the definition of the term "plumbing and heating supplies," plus the specific allegation with respect to installation, once more makes clear the fact that it is not the commodities themselves which are being sold by appellants, but a completed and fabricated system.

If, as has been stated, the distinction between interstate and intrastate activities is to have substance rather than lip-service, a line must somewhere be drawn. Appellants do not urge any mechanical test upon this Court; they do, however, submit that of all of the commercial activities whose relationship to Federal jurisdiction has been considered by legislative or judicial bodies, the generic field of construction and building activities almost uniformly has been considered to be concerned with intrastate commerce. An extensive list of Federal statutes dealing with Federal regulation of wages, hours and working conditions has been collected in a note in 51 *West Virginia Law Quarterly,* 264. It is there pointed out that in almost every instance Congress has either decided or acquiesced in the generally accepted attitude that

those engaged in construction work are not sufficiently connected with interstate commerce to come within the purview of Federal authority, as opposed to state authority.

Once again we emphasize that no mechanical test is here being proposed to the effect that construction workers generally are beyond the scope of Federal regulation, for it is clear that in many areas, notably under the standards laid down in the Fair Labor Standards Act, the nature of the employee's functions may produce a different result. Nevertheless, it is submitted that the basic reason for the tendency to place construction workers under state rather than Federal supervision is because of the feeling that their trade is engaged in the fabrication of buildings and their components, roads, etc., which will not thereafter wander from their site. This same policy underlies the decision of Judge Yankwich quoted above. We submit that it is a position well buttressed by legislative and judicial policy, and in accord with realistic facts of commercial life.

C. The Fact That Appellant Plumbing Contractors Are Essential for the Installation of Plumbing and Heating Items Shipped in Interstate Channels Is Not Sufficient to Bring Appellants Within the Purview of the Sherman Antitrust Act.

Because of the fact that appellant plumbing contractors do not sell to the ultimate consumer the specific item shipped in interstate commerce as set forth at length above, the indictment seeks to bring appellants within the Sherman Act by allegations that they are "an integral part of and necessary to" the interstate shipment of plumbing and heating items. To this end it is alleged in

paragraph 17 of the indictment that the ultimate consumer does not himself ordinarily install plumbing or heating supplies, such work being performed by skilled plumbing contractors.

The issue with respect to this allegation was treated at great length in the leading case of *Hopkins v. United States,* 171 U. S. 578, 43 L. Ed. 290 (1898). The fact situation in that case concerned commercial agents connected with the Kansas City Stock Exchange. The facts indicated that commercial agents in the exchange entered into an association which excluded from that trade all non-members of the Association, and fixed the rates at which their services would be rendered. The argument for the Government in that case, as in the case at bar, was that interstate commerce was burdened by reason of this agreement, because of the fact of price fixing, and that since commercial agents were essential for the interstate shipment of cattle terminating in the Kansas City stock yards, Federal jurisdiction should extend to them, and specifically that the Sherman Act should be held violated. The Court in considering these facts and assuming their proof, rejected this motion, and held that the mere fact of being essential to the interstate movement of goods does not in and of itself bring one within the purview of interstate commerce.

> "For example, cattle, when transported long distances by rail, require rest, food, and water. To give them these accommodations it is necessary to take them from the car and put them in pens or other places for their safe reception. Would an agreement among the landowners along the line not to lease their lands for less than a certain sum be a contract within the statute as being in restraint of interstate trade or commerce? Would it be such a

> contract, even if the lands, or some of them, were necessary for use in furnishing the cattle with suitable accommodations? Would an agreement between the dealers in corn at some station along the line of the road not to sell at below a certain price be covered by the Act, because the cattle must have corn for food? Or would an agreement among the men not to perform the service of watering the cattle for less than a certain compensation come within the restriction of the statute? . . . Would an agreement among dealers in horse blankets not to sell them for less than a certain price be open to the charge of a violation of the Act because horse blankets are necessary to be put on horses to be sent on long journeys by rail and by reason of the agreement the expense of sending the horses from one state to another for a market might be thereby enhanced? . . . In our opinion all these queries should be answered in the negative." (171 U. S. 593-594, 43 L. Ed. at 296.)

The precise question being considered here was also raised in *United States v. Greater Kansas City Chapter, National Electrical Contractors Association,* 83 Fed. Supp. 147 (W. D. Mo. 1949). The defendants in that action were electrical contractors within the State of Missouri who allegedly had entered into a conspiracy not to provide any skilled labor for the installation of electrical systems unless the owner or builder either purchased the materials from them or paid them a substantial part or all of the profits which the contractors would have received had they sold the materials as well as the labor. In dismissing this indictment the Court held as follows:

> "Assuming that the defendants were indispensable to the installation, etc., of electrical systems in that

> area or community, and, assuming, further, that their refusal to contract with the owners and builders unless they complied with their (defendants') demands, would impede and interfere with the free flow of interstate commerce, yet, under the express ruling of the Supreme Court in *Apex Hosiery v. Leader, et al.,* 310 U. S. 469, loc. cit. 482, 483, 484, 485, 486, 490, 492, 493, 497, 498, 500 and 501, 60 S. Ct. 982, 84 L. ed. 1311, 128 A. L. R. 1044, this would not be sufficient, and they would not be guilty of violating the law." (82 Fed. Supp. 149.)

By the allegation in paragraph 17 of the indictment, that appellant plumbing contractors are essential for the installation and creation of plumbing and heating systems, we are brought but little closer to the conclusion that appellants' business activities in general and the specific conspiracy alleged comes within the purview of the Sherman Act. Patently, in an economy so tightly knit as present-day America, few occupations indeed, if any, can be said to be completely divorced from the use in one way or another of commodities which commence their existence in another state. No decided case of which appellants' counsel are aware has held that the indispensability of the trade standing alone to the consumption of a commodity which has been shipped from another state is sufficient to sustain the basic jurisdiction of the Sherman Act. On the contrary, *Hopkins v. United States,* 171 U. S. 578, is still cited as good law in the most recent United States Supreme Court decisions dealing with the question of interstate commerce under the Sherman Act.

The case of *Hopkins v. United States,* 171 U. S. 578, and the case of *Anderson v. United States,* 171 U. S.

604, of similar import as the *Hopkins* case, were cited with approval in *United States v. National Association of Real Estate Boards,* 339 U. S. 485, 492, 70 S. Ct. 711, 716 (1950), and represent the present law on the question of interstate commerce under the Sherman Act.

In both the *Anderson* and the *Hopkins* cases, the United States Supreme Court considered the remote effect of the activity of the parties in respect to interstate commerce, and rejected the application of the Sherman Act.

This is emphasized in the *National Association of Real Estate Boards* decision by the opinion of Mr. Justice Douglas, page 492, as follows:

> "Hopkins v. United States, 171 U. S. 578 * * * and Anderson v. United States, 171 U. S. 604 * * * are not opposed to this conclusion. It was held in those cases that commission merchants and yard traders on livestock exchanges were not engaged in interstate commerce even though the livestock moved across state lines, *cf.* Stafford v. Wallace, 258 U. S. 495 * * *, and therefore that the rules and agreements between the merchants and traders (which included in the Hopkins case the fixing of minimum fees) did not fall under the ban of the Sherman Act. But we are not confronted with that problem here. As noted, we are concerned here not with interstate commerce but with trade or commerce in the District of Columbia."

Mr. Justice Jackson dissenting at page 496, stated:

> "If real estate brokerage is to be distinguished from the professions or from other labor that is permitted to organize, the Court does not impart any standards for so doing.
>
> "It is certain that those rendering many kinds of service are allowed to combine and fix uniform rates

of pay and conditions of service. This is true of all laborers, who may do so within or without unions and whose unions frequently do include owners of establishments that employ, others, such as automobile sales agencies. See, for example, International Brotherhood of Teamsters, etc. v. Hanke, 339 U. S. 470, 70 S. Ct. 773. I suppose this immunity is not confined to those whose labor is manual and is not lost because the labor performed is professional. The brokerage which is swept under the anti-trust laws by this decision is perhaps a border-line activity. However, the broker furnishes no goods and performs only personal services. Capital assets play no greater part in his service than in that of the lawyer, doctor or office worker. Services of the real estate broker, if not strictly fiduciary, are at least those of a trusted agent and, oftentimes, advisory as to values and procedures. I am not persuaded that fixing uniform fees for the broker's labor is more offensive to the anti-trust laws than fixing uniform fees for the labor of a lawyer, a doctor, a carpenter, or a plumber. I would affirm the decision of the court below."

D. The Allegations in the Indictment With Respect to the Flow of the Plumbing and Heating Items Are Insufficient to Charge a Violation of the Sherman Act.

In line with the Government's attempt to bring appellant plumbing contractors within the Sherman Act, in spite of the fact that their business activities are limited, as the indictment itself sets forth, to the fabrication of plumbing and heating systems rather than the sale of the plumbing and heating items themselves, the indictment goes one step further than that set forth in Subdivision C above and alleges that the "plumbing and

heating supplies flow in a continuous, uninterrupted stream from their points of origin in states other than Nevada, to their places of installation and use in buildings in Southern Nevada." [Indictment par. 17.] This allegation is preceded by one which alleges that appellant plumbing contractors "are conduits through which plumbing and heating supplies" from outside of the state are "sold and distributed to the consuming public in Southern Nevada." [Indictment par. 17.]

This use of language is undoubtedly intended to bring this indictment within the ruling of this Circuit in *United States v. Chrysler Corp. Parts Wholesalers,* 180 F. 2d 557 (C. C. A. 9, 1950). In that case, strikingly similar language was held sufficient to state a cause of action under the Sherman Act. In that indictment it was alleged that the defendants as distributors of Chrysler products imported engines and automotive parts from out of the state in anticipation of and in response to orders and demands from customers within the state. Therefore, it was alleged, the defendants as distributors served as a conduit through which the parts and engines moved "in a regular and continuous and uninterrupted flow to the the ultimate users of the parts and engines within the state" (180 F. 2d at 558). For this reason, it was alleged, the purchase and resale of parts and engines by the defendant distributors "is an integral part of and incidental to the uninterrupted movement (of said parts) in interstate commerce from the (out of state factories) to the ultimate users" of the parts within the state. (180 F. 2d at 558.)

In commenting upon the sufficiency of this indictment, this Court held as follows:

"We conclude that paragraph 10 of the indictment

> contains a sufficient allegation to charge that at least part of the trade restraint by the alleged conspiracy is in interstate commerce. Effect must be given to the allegation that 'replacement parts and engines move in a continuous and uninterrupted flow to the ultimate users of said parts and engines in the State of Washington.' Appellees contended that said allegation is no more than a conclusion of law. Taken with other allegations we think it is a statement of ultimate fact." (18 F. 2d at 559.)

The difference between the indictment there held to be sufficient and the indictment under consideration here points up the deficiency which appellants here urge as a ground for reversal of the Court below. The indictment in the case at bar studiously avoids any reference to an "uninterrupted movement" of goods in interstate commerce to the ultimate consumer. It was this precise formulation which this Court held legitimized the indictment in the *Chrysler* case, since reliance was there placed upon the case of *Walling v. Jackson Paper Company,* 317 U. S. 564, which dealt with the question of the cessation of the interstate flow of goods. The indictment under consideration in this case sets forth with unmistakable clarity that there is in fact a very real interruption in the flow of goods between its out-of-state source and its ultimate use, since the indictment itself specifically limits itself to an alleged conspiracy dealing only with the fabrication of plumbing and heating systems which are the combination of material and labor. Whereas in the *Chrysler* indictment the allegation with respect to the defendants being the "conduit" for the "regular, continuous and uninterrupted flow" was given substance and meaning by the allegations that the defendants purchased from out of state the very items

which they resold to the ultimate consumer within the state, the indictment in the case at bar, while attempting to use the same formula, employs an empty shell without the substance of commercial reality. While, indeed, the indictment in the case at bar seeks to bring itself within the ruling in the *Chrysler* case by alleging that the appellant contractors are conduits through which plumbing and heating supplies are distributed to the consuming public and that said supplies flow in a continuous and uninterrupted stream from out of the state to their place of use, the primary sentence in the paragraph containing these allegations—paragraph 17— indicates this is in fact not so, since ultimate consumers, it is alleged, do not install said supplies, but that this service is performed by a plumbing contractor who employs and supervises skilled labor for this purpose. In fact, the theory and framework of the entire indictment supports this first sentence from the definitions of terms used through the description of the offense charged.

A situation analogous to that presented in the indictment in the *Chrysler* case, when applied to the plumbing industry, would be an indictment against *wholesalers* as that term is defined in paragraph 9 of the indictment, since there also is a business activity concerned with the purchase from out of state of supplies and their sale intrastate. The situation in the indictment in the case at bar, however, when analogized to that in the *Chrysler* case, would be an indictment brought against automobile mechanics engaged in the rebuilding of engines from parts imported from out of state and which rebuilt engines were then offered for sale rather than the individual parts.

II.

The Trial Court Committed Prejudicial Error in Charging the Jury That a Conspiracy to Fix Prices Standing Alone Constituted a Violation of the Sherman Antitrust Act, Since There Was Omitted Completely From Such Charge the Requirement That Such Conspiracy in Intent, Purpose or Necessary Effect Have Some Substantial Effect Upon Interstate Commerce.

Several of the Court's instructions to the jury charged them with respect to that aspect of the indictment which alleged a conspiracy among appellants to fix the prices of plumbing and heating commodities. Notably absent from these instructions is any reference to the concept of a relationship between any such agreement and a substantial effect upon interstate commerce. The balance of the instructions demonstrate that this omission was neither accidental nor cured at some other point in the instructions, as the discussion in succeeding parts of this brief indicate.

Instruction number 18 given by the Court charged the jury that "any combination which by agreement tampers with price structures is engaged in an unlawful activity." [Tr. p. 123.]

Instruction number 19 given by the Court charged the jury that while it is perfectly lawful to use a price service or a price book in the regular course of one's business,

> "when two or more businessmen agree to use the prices contained in a given price book to fix prices, by the mere fact of so agreeing they have abandoned their status as independent competitors and have become engaged in an unlawful combination to fix prices." [Tr. p. 124.]

Instruction number 20 charged the jury that while there was in itself no violation of any law in selecting a common estimator whose services would be made available freely,

> "if you find that it was agreed that a person to be known as an estimator would be employed to fix prices and determine the amount to be bid by plumbing contractors, including defendant plumbing contractors in their submission of estimates or bids for the sale and installation of plumbing and heating supplies or specific jobs, you are instructed that such agreement is in violation of the Sherman Act." [Tr. p. 125.]

Instruction number 22 charged the jury that if they should find that there was in fact an agreement among appellants to fix the prices at which they would distribute and sell plumbing and heating supplies, then irrespective of the quantity of supplies involved such an agreement would be unlawful under the Sherman Act. [Tr. p. 126.]

The view of the law thus presented to the jury by these instructions is an extremely narrow one, dependent not at all upon the effect of the alleged conspiracy to fix prices upon interstate commerce. While ensuing instructions, it is true, refer somewhat more to the movement of goods across state lines than do the instructions referred to above, instructions numbers 18, 19, 20 and 22 by virtue of their number and positive assertions require treatment as a unit. While instructions must be viewed as a whole, it is also necessary to consider the effect upon the jury which four instructions given almost in sequence upon the same subject matter must have had.

The concept of the application of the Sherman Act, as expressed by the Trial Court in these instructions, finds

no support in cases dealing with the question of a conspiracy to fix prices. The most recent United States Supreme Court case which has considered this question in detail is the leading case of *Mandeville Island Farms v. American Crystal Sugar Company,* 334 U. S. 219, 68 S. Ct. 996 (1948). In this case, had the United States Supreme Court adopted the view taken by the Trial Court herein, as reflected by instructions 18, 19, 20 and 22, the decision, instead of requiring a number of pages, could have been delivered in a few paragraphs.

In a decision by Mr. Justice Rutledge, the Court considered the applicability of Sections I and II of the Sherman Act to an amended complaint for treble damages by growers of sugar beets against the sugar refiners having a complete monopoly over the purchase, refining and interstate shipment of the sugar and sugar beets. It was alleged that these refiners entered into an agreement to fix prices and otherwise regulate the conditions of sale and distribution of sugar and sugar beets. Since the case came before the Supreme Court on demurrer there was of course admitted the allegation with respect to the fixing of prices at which the refiners would purchase sugar beets for subsequent refining into sugar and its interstate shipment. Far from disposing of the case by a statement that because there was a conspiracy to fix prices the Sherman Act had been violated, the Supreme Court delivered a detailed and searching analysis of the reasons why this particular conspiracy to fix prices stated a cause of action under the Sherman Act. Again and again throughout the decision the Court refers to the requirement that before the Sherman Act can apply to a price-fixing conspiracy there must be some substantial effect upon interstate commerce.

Reviewing the various decisions which had held the process of manufacture to be a purely local activity and for that reason alone beyond the scope of the Sherman Act, the Court underscored the more recent cases in which a realistic economic point of view was adopted instead of a mechanical one. The real test to be applied, said the Court, was "the practical impeding effect" upon interstate commerce rather than any shibboleth of "production" or "manufacture," "incidental" or "indirect." (334 U. S. at 231, 233.) In the process of determining whether any combination or conspiracy alleged to be in violation of the Sherman Act in fact comes within its proscription, however, the Court indicated with clarity the tests to be applied:

> "The inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process, is now merely a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented. [Footnote No. 14: In *United States v. Frankfort Distilleries,* 324 U. S. 293, 297, 65 S. Ct. 661, 663, 89 L. ed. 951, we said:
>
> > 'It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the anti-trust laws on the basis of the purely local aims of a combination, insofar as its aims were not modified by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce.'
>
> The decisions cited were *Industrial Association of San Francisco v. United States,* 268 U. S. 64, 45 S. Ct. 403, 69 L. ed. 849; *Levering and Garrigues*

Company v. Morrin, 289 U. S. 103, 53 S. Ct. 549, 77 L. ed. 1062; *United Leather Workers v. Herkert and Meisel Trunk Company,* 265 U. S. 457, 44 S. Ct. 623, 68 L. ed. 1104, 33 A. L. R. 566; *cf. Local 167 of International Brotherhood of Teamsters v. United States,* 291 U. S. 293, 297, 54 S. Ct. 396, 398, 78 L. ed. 804; and *United States v. Hutcheson,* 312 U. S. 219, 61 S. Ct. 463, 85 L. ed. 788.] *For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence."* (334 U. S. 234.) (Emphasis added.)

The Court in the *Mandeville* case next turned to a discussion of the same rule of substantial affectation upon interstate commerce from a slightly different perspective. The concept which had been advanced in *United States v. Frankfort Distilleries, supra,* with respect to the test to be applied in determining whether a price-fixing conspiracy came within the purview of the Sherman Act was approved and reiterated and applied to the facts as presented in the amended complaint. This rule as set forth in the *Frankfort Distilleries* case was evolved for a set of facts where the conspiracy was alleged to apply to a price-fixing scheme covering retail sales of liquor within a particular state. The conspiracy in that case not only fixed the retail prices at which liquor was to be sold within the state, but, in addition, governed the type of agreement used in making inter-

state sales and compelled price maintenance contracts for out-of-state producers of alcoholic beverages. The defendants in that case argued alternatively that either they were not covered by the Sherman Act because retail sales were wholly intrastate, or else that the state's power to control liquor traffic made the Sherman Act inapplicable. The Court there, in language later specifically approved in the *Mandeville* case, held as follows:

> "These two questions thus posed relate to the extent of the Sherman Act's application to trade restraints resulting from actions which took place within a state. In resolving them, *there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a major program dependent for its success upon activity which affects commerce between the states.* It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-trust laws on the basis of the purely local aims of a combination, insofar as those aims were not modified by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly turn upon interstate commerce." (324 U. S. 297.) (Emphasis added.)

The Court in that case held that although the conspiracy might have dealt as one of its functions with the fixing of the intrastate sales price of liquor, it was essential to the success of this conspiracy that interstate traffic in the commodity be reached and controlled:

> "Whatever was the ultimate object of this conspiracy, the means adopted for its accomplishment

reached beyond the boundaries of Colorado. The combination concerned itself with the type of contract used in making interstate sales. Its coercive power was used to compel the producers of alcoholic beverages outside of Colorado to enter into price maintenance contracts . . . Local purchasing power was the weapon used to force producers making interstate sales to fix prices against their will." (324 U. S. 293, 298.)

The court in the *Mandeville* case adopted a similar line of reasoning with respect to the facts there presented. They held that while the conspiracy to fix prices for the purchase of sugar beets might under some circumstances not then presented to the Court be considered an intrastate activity, under the facts presented by the amended complaint it was clear that the whole basis for this intrastate activity was the subsequent refinement of sugar from the beets and its interstate shipment:

"We do not stop to consider specific and varied situations in which a change of form amounting to one in the essential character of the commodity takes place by manufacturing or processing intermediate the stages of producing and disposing of the raw material intrastate and later interstate distribution of the finished product; or the effects, if any, of such a change in particular situations unlike the one now presented. (Citing in a footnote at this point *Arkadelphia Milling Company v. St. Louis Southwestern Railway Company,* 249 U. S. 134, 39 S. Ct. 237, and *Cloverleaf Butter Company v. Patterson,* 315 U. S. 148, 62 S. Ct. 491). . . . But under the facts characterizing this industry's operation and the tightening of controls in this producing area,

by the new agreements and understandings, there can be no question that their restrictive consequences were projected substantially into the interstate distribution of the sugar, as the amended complaint repeatedly alleges. Indeed, they permeated the entire structure of the industry in all its phases, intrastate and interstate.

"We deal here, as petitioners say, with an industry tightly interwoven from sale of the seed through all the intermediate stages to and including interstate sale and distribution of the sugar. In the middle of all these processes and dominating all of them stand the refiners. They control the supply and price of seed, the quantity sold and the volume of land planted, the processes of cultivation and harvesting, the quantity of beets purchased and rejected, the refining and the distribution of sugar both interstate and local." (334 U. S. 238-239.)

Once again the Court in this case, in a subsequent portion of the opinion, warned that it must not be understood as applying any mechanical rule, as the Trial Court did in the case at bar, with respect to a conspiracy to fix prices:

"We deal with the facts before us. With respect to others which may be significantly different, for purposes of violating the statute's terms and policy, we await another day." (334 U. S. 244.)

Notably lacking from the Trial Court's instructions with respect to the alleged conspiracy to fix prices in the instant case, are any of the elements referred to above in the leading Supreme Court cases on the subject. The more recent authorities have emphasized that they will

no longer be bound by the older cases which sought to impose artificial legal concepts to economic realities, thereby isolating from Federal jurisdiction a given activity simply because it is "manufacturing" or "processing." The entire emphasis of the recent decisions has been that instead of deciding cases by the use of labels, courts must look to the economic substance beneath them to determine whether or not any given alleged conspiracy in fact has a substantial effect upon interstate commerce and whether any given alleged conspiracy realistically operates wholly within a state, or whether for its very success it is dependent upon reaching beyond state lines.

The instructions cited above in fact are a return to the older technique of deciding a case by the application of a label rather than by a consideration of the economic substance of the facts before it. For by these instructions the jury was charged that a conspiracy to fix prices was without more a violation of the Sherman Act, and the necessary interrelation with the other factors as set forth in the *Mandeville Island* and *Frankfort Distilleries* cases were not included within these instructions for the jury's determination.

III.

The Trial Judge Committed Prejudicial Error in Charging the Jury That the Fact That the Movement of Commodities in Interstate Commerce Has Come to a Halt Is a Completely Immaterial Factor Not to Be Considered by Them.

The Trial Court, in Instruction Number 26, dealt with the subject of goods which had been shipped in interstate commerce coming to rest within the state. The jury was instructed, following the view of the law set forth in the instructions discussed in Point II above, that a violation of the Sherman Act would be proved if there was a conspiracy to fix prices within a state even though "the product originating in interstate commerce may actually have come to rest on the shelf of the 'retailer.' . . . The inquiry seeks the effect upon prices in the market. And if this effect be shown, it matters not that the movement has come to a halt within the state." [Tr. pp. 130-131.]

The use of the word "retailer" in the above instruction may well have been confusing to the jury, in view of the fact that no evidence in the case dealt with the retailing of plumbing and heating supplies. We pass this however, for the more substantial error in this Instruction.

The jury by this Instruction was therefore charged once again that a conspiracy to fix prices alone constitutes a violation of the Sherman Act. To this concept of the law, however, was added the negative idea that the jury should disregard as having no bearing upon their deliberations the question of whether goods originating

from out of state had come to rest within the state. Since a substantial amount of testimony with respect to this matter had gone into the record, as is discussed in Point VIII, *infra,* and since these facts form the basis for a substantial portion of defendants' theory as demonstrated by Defendants' Requested Instructions Numbers 16, 17, 18, 19, 21, the giving of this instruction constituted a substantial and highly prejudicial error if it misstated the prevailing law upon the subject matter. We contend that it does so misstate the law.

As has been indicated in previous portions of this brief, no single test has yet been adopted by the United States Supreme Court to the exclusion of all other tests in determining Federal jurisdiction under the Sherman Act. Some of the current tests have been discussed above. Another of such tests is to be found in the concept that Federal jurisdiction under the Sherman Act cannot be said to extend so far into intrastate activities so as to reach goods which, although they may have originated in interstate commerce, have been removed from the flow of commerce interstate by reason of their having come to rest within the state, either by a process of commingling, delivery to their destination, or other substantially interrupting phenomenon.

Thus in the leading case of *Walling v. Jacksonville Paper Company,* 317 U. S. 564 (1943), the Court considered this test alone in deciding whether there was Federal jurisdiction under the Fair Labor Standards Act. In that case the Court was concerned with the question of whether goods may be said to have been still in interstate commerce when they were shipped from out-of-state

This Court has also had occasion to consider the problem with respect to a closely analogous set of facts in *Foster and Kleiser Company v. Special Site Sign Company,* 85 F. 2d 742 (C. C. A. 9, 1936). In that case this Court was considering a set of instructions given by the Trial Court which did not present to the jury the issue as to whether in fact the commodities shipped across state lines were still within interstate commerce or whether the activities of the defendants were sufficiently connected with interstate commerce. In holding the instructions as there set forth to be erroneous, this Court stated:

> "By these instructions the Court ignored the hiatus which existed between the manufacturer and the transportation of the lithographs, and also between the transportation and the display thereof; the display being essentially local in character after all transportation, local or interstate, had ceased. *Packer Corporation v. State of Utah,* 285 U. S. 105, 52 S. Ct. 273, 76 L. ed. 643, 79 ALR 546. Under such circumstances, in order to come within the provisions of the anti-trust laws, the effect upon interstate commerce must be direct and not remote, and must be the result of an intent to restrain interstate commerce. *Coronado Coal Company v. United Mines Workers,* 268 U. S. 295, 45 S. Ct. 551, 69 L. Ed. 963; *Packer Corporation v. State of Utah, supra.* . . . What occurs before transportation and after transportation in interstate commerce is generally within the legislative power of the state and not that of the United States, unless the effect upon interstate commerce is direct. *Schechter Poultry Corporation v. United States, supra.* The Sherman Anti-Trust Act regulating interstate commerce must be construed with refer-

ence to the respective powers of the state and the United States over the business transactions of the people." (85 F. 2d 750.)

To the same effect see:

Industrial Association of San Francsico v. United States, 268 U. S. 64, 79 (1925);

United States v. San Francisco Electrical Contractor's Association, 57 Fed. Supp. 57 (S. D. Cal., 1944);

United States v. French Bauer, 48 Fed. Supp. 260 (W. D. Ohio, 1942) (appeal dismissed 318 U. S. 795);

Ewing-Von Allmen Dairy Company v. C and C Ice Cream Company, 109 F. 2d 898 (C. C. A. 6, 1940).

Thus, the Trial Court effectively removed from the jury by its charge the consideration as to whether the plumbing and heating supplies which may have come from out of state had in fact either come to rest on the shelves of the wholesalers or the appellants themselves under circumstances which, according to the above cited cases, would have removed their interstate character, or because their having been commingled with other goods and used in the fabrication and construction of plumbing and heating systems had also deprived them of their interstate character by reason of the above cited authorities.

That this error was not only not corrected in subsequent instructions, but was in fact compounded, is indicated by Instruction Number 25. [Tr. pp. 128-130.] This instruction purports to be a characterization of the essential

allegations in the indictment. Significant differences, however, point up the view of the law on the subject of interstate commerce held by the trial judge and charged to the jury.

Thus, paragraph 17 of the indictment alleges that appellant plumbing contractors are "conduits through which plumbing and heating supplies" from out of state are distributed to the consuming public in Nevada and that said supplies "flow in a continuous, uninterrupted stream" from out of state to their places of installation and use in Nevada. [Tr. pp. 9-10.] The Court's charge in Instruction Number 25 in characterizing this allegation, however, omits any reference to the flow of supplies in a "continuous, uninterrupted stream" and instead charges simply that the indictment alleges that appellants are "an integral part of and necessary to" the movement in interstate commerce "of plumbing and heating supplies from outside the state to their installation within the state." Thus the Court emphasized that the jury is not to consider whether the goods were interrupted in their interstate movement and underscores its proposition that a violation of the Sherman Act can be found if there has been a conspiracy to fix prices upon goods which at any time or under any circumstances found their way into the state from an out-of-town source.

IV.

The Trial Court Committed Prejudicial Error in Omitting From Its Instructions Any Reference to the Necessity of the Jury's Finding That the Conspiracy Alleged Must Be Proved Beyond a Reasonable Doubt to Have Been in Purpose, Intent or Necessary Effect a Direct, Substantial, Unreasonable, Arbitrary and Unlawful Restraint and Obstruction of Interstate Commerce.

The instructions delivered by the Trial Judge dealing specifically with the nature of the alleged conspiracy for which appellants were tried is significantly lacking in any reference to the purpose, intent and necessary effect of the alleged conspiracy with respect to the character of the restraint upon interstate commerce. This omission is most clearly pointed up when the instructions upon the subject are compared with the indictment which contains at least some reference to this requirement. Thus, paragraph 21 of the indictment charges that "the purpose, intent and necessary effect of the aforesaid combination, and conspiracy, has been and is to directly, unreasonably, arbitrarily and unlawfully restrain and obstruct the flow of plumbing and heating supplies in interstate commerce. . . ." [Tr. p. 12.] In the Court's paraphrase of the indictment contained in Instruction Number 25, however, and in the other instructions dealing with the subject matter of interstate commerce [Instructions Numbers 18 through 26] there is no reference to the requirement that the conspiracy alleged must have any particular ef-

fect whatsoever or any particular purpose or intent whatsoever, so far as interstate commerce is concerned.

That such is not the law has been amply demonstrated in citing from the leading case of *Mandeville Island Farms v. American Crystal Sugar Company, supra.* As there set forth, courts only preliminarily examine the particular conspiracy alleged, and then must pass on to the question of whether, assuming such a conspiracy, there has been any necessary and substantial effect on interstate commerce so as to run afoul of the Sherman Act. Indeed, in that very case the Court cited with approval a line of cases commencing with *Industrial Association of San Francisco v. United States,* 268 U. S. 64, in which, for the very reasons omitted by the Trial Court in its instructions, the particular conspiracies alleged were held not to fall within the purview of the Sherman Act.

Thus, in the *Industrial Association* case the question before the Court was a criminal indictment against a number of associations and individuals who had conspired to fix the conditions for use of building materials in construction within California. Most of the construction materials used were manufactured within the state, but at least one important item, plaster, came from out-of-state sources. In holding that this combination of individuals did not fall by the terms of their conspiracy within the terms of the Sherman Act, the Court stated as follows:

> "Interference with interstate trade was neither desired nor intended. . . . The thing aimed at and sought to be attained was not restraint of the inter-

> state sales or shipment of commodities, but was a purely local matter, namely, regulation of building operations within a limited local area, so as to prevent their domination by the labor unions." (268 U. S. 77.)

The Court in that case then stated that it was also necessary to go beyond the intent of the conspiracy and determine whether the means adopted substantially affect and unduly obstruct the free flow of interstate commerce. The evidence in that case indicated that because of the conspiracy there were building contractors who were unable to purchase certain materials and therefore would not proceed with their building plans and thus would not order certain out-of-state commodities which they otherwise would have imported. The Court held this to be not the kind of direct and substantial effect upon interstate commerce which made applicable the terms of the Sherman Act.

> "This ignores the all important fact that there was no interference with the freedom of the outside manufacturer to sell and ship or of the local contractor to buy. The process went no further than to take away the latter's opportunity to use, and, therefore, his incentive to purchase. The effect upon, and interference with, interstate trade, if any, were clearly incidental, indirect and remote—precisely such an interference as this Court dealt with in *United Mine Workers v. Coronado Company, supra,* and *United Leather Workers v. Herkert,* 265 U. S. 45." (268 U. S. 80.)

To the same effect see:

Levering and Garrigues Company v. Morrin, 289 U. S. 103, 53 S. Ct. 549 (1933);

National Labor Relations Board v. Jones and Laughlin Steel Corporation, 301 U. S. 1 (1936);

United States v. Bay Area Painters and Decorators Joint Committee, 49 Fed. Supp. 733 (N. D. Cal., 1943);

Atlantic Company v. Citizens Ice and Coal Storage Company, 178 F. 2d 453 (C. C. A. 5, 1949) (cert. den., 339 U. S. 953);

Albrecht v. Kinsella, 119 F. 2d 1003 (C. C. A. 7, 1941);

Neumann v. Bastian-Blessing Company, 71 Fed. Supp. 803 (E. D. Ill., 1946);

United States v. San Francisco Electrical Contractors Association, 57 Fed. Supp. 57 (S. D. Cal., 1944).

V.

The Trial Court Committed Prejudicial Error by Reason of Its Failure, in Its Instructions to the Jury, to Charge That It Was the Jury's Function to Apply the Facts Presented to the Law as Given in Ultimately Determining Whether the Alleged Conspiracy Was in Purpose or Effect a Sufficiently Direct and Substantial Burden Upon Interstate Commerce so as to Constitute a Violation of the Sherman Act.

As set forth in Point IV above, the Trial Court omitted from its instructions with respect to interstate commerce, the ultimate fact to be determined before a violation of the Sherman Act could be found: Whether the conspiracy alleged was the kind of a conspiracy which because of its purpose and necessary effect directly and substantially burdens the flow of interstate commerce.

The only matters presented to the jury for its determination were whether the matters of facts as set forth in the indictment were true or not. At no time were the ultimate conclusions set forth in the indictment presented to the jury for their determination.

This Court has recently held that such an omission constitutes reversible error. In *Morris v. United States,* 156 F. 2d 525 (C. C. A. 9, 1946) (rehear. den.), this Court had before it a conviction for violating the Emergency Price Control Act. In that case the Trial Court instructed the jury that if they believed that the defendant had in fact performed the acts which were ascribed to him in the indictment, which consisted of the sale of oranges at a particular price above the price ceiling and the wilful falsification of the records of his company in connection with this transaction, that the jury should

find the defendant guilty. The judge did not present to the jury in its instructions the ultimate facts to be determined by them which were set forth in the statute itself. The Court held as follows:

> "If the judge were permitted merely to tell the jury, as was done in this case, that upon the finding of certain facts their verdict would be guilty of the offense charged without acquainting them with the charge, or upon the finding of certain other facts the verdict would be not guilty of the offense charged, the jury would never know whether or not the facts that they found had any relation to the offense charged. *The verdict is not merely a report on the facts; it is a legal decision that the facts laid before them do or do not fit the essential elements of a social proscription, the violation of which entails a penalty.*" (156 F. 2d 531.) (Emphasis added.)

A similar problem and holding is to be found in *United States v. Noble,* 155 F. 2d 315 (C. C. A. 3, 1946). In that case the defendant was convicted under the War Powers Act and the Trial Court failed to instruct with respect to the nature and elements of the offense, relying instead upon the Information, which was sent into the jury room with the jury. On appeal the Government argued that since the Information set out a recital of facts which if true amounted to a violation of the law, it was only necessary to a determination that defendant was guilty of the crime charged that the jury should find the facts as set forth in the Information. The Appellate Court, however, reversed the conviction, holding as follows:

> "If the jury's only duty was by a special verdict to answer interrogatories as to the existence of certain facts and to leave to the judge the application

of the law to the facts thus found, it might have been sufficient merely to give them a copy of the information for their guidance in performing this duty, but the jury in the present case had a much greater duty than this. They were called upon to determine by a general verdict not only whether the defendant did certain acts which he was alleged to have done, but also whether the doing of those acts amounted to the commission of the crime against the United States with which he was charged. In making that determination it was necessary for them to apply the law to the facts as they found them to be. Accordingly, it was essential that they be instructed upon the rules of law which they were to apply, the most fundamental and important of which were the essential elements of the crime charged. It follows that the jury could not have returned an informed general verdict in the absence of instructions by the trial judge as to these essential elements even though they were permitted to consult and study the information." (155 F. 2d at 317-318.)

The procedure erroneously followed in the two cases cited above was also adopted in the instant case. It is not sufficient under the authorities cited for a violation under the Sherman Act to be found that there be a conspiracy to fix prices or to allocate plumbing and heating construction work upon supplies which at some time or another came from out-of-state sources. It is essential that the ultimate fact be present before a conviction can be sustained or an indictment set forth a sufficient showing of Federal jurisdiction: That the activities complained of have a direct and substantial effect upon the flow of goods in interstate commerce in such a manner that the evils at which the Sherman Act are aimed may

be deemed to be present. This ultimate fact, whether stated in the language here employed or in its variations used from time to time by courts in considering Sherman Act violations was never included within these instructions. Thus the Court obtained from the jury and could only obtain from the jury a "report on the facts." The application of these facts to the law as set forth in the Sherman Act was decided in advance by the Trial Court and withheld by him from the jury's deliberations.

VI.

The Trial Court Committed Prejudicial Error in Refusing to Instruct the Jury in Any Single Particular With Respect Either to Appellants' Theory of the Case or With Respect to the Converse of Any of the Instructions Given.

Although a large number of instructions were requested on behalf of appellants, a substantial portion of which dealt with the question of interstate commerce, not one of these instructions was given by the Trial Court. An examination of these instructions (particularly defendants requested Instructions Nos. 10, 12, 13, 16, 17, 18, 19, 22, 24, 25, 26, 27 and 53) indicates that appellants' theory at the time of trial was as follows: Appellants deny the charges with respect to the formation of a conspiracy, the charge with respect to the fixing of prices, the allocation of jobs and the denial of experienced workmen to those contractors not designated by the conspiracy; that even the presence of such a state of facts would not constitute a violation of the Sherman Act; that even assuming that substantial amounts of plumbing and heating items were shipped into Nevada from out-of-state sources, the effect of the alleged agreement

among appellant plumbing contractors in its intent and necessary effect was not such an unreasonable, direct, substantial and immediate restraint of trade and interstate commerce as to constitute a violation of the Sherman Act; and that even assuming that all of the items which went into a completed plumbing and heating system were brought into Nevada from out-of-state sources, the Sherman Act was not applicable because the interstate movement of these goods had become interrupted prior to the effect of the alleged agreement among appellant plumbing contractors because of the fact that such goods normally remained for substantial periods of time upon the shelves of wholesalers and appellant plumbing contractors and because of the fact that such goods were commingled with other goods by the addition of skilled labor into the fabrication and construction of finished plumbing and heating systems.

Although this positon is well substantiated by the cases cited in Points I to V above as a reasonable construction of the present law with respect to the application of the Sherman Antitrust Act, the Trial Judge refused to instruct the jury in accordance with any of these numerous requests. Thus appellants were in effect denied the right to have placed before the jury their view of the evidence and their interpretation of the proof which had been adduced. Such refusal on the part of the Trial Court is prejudicial error.

Little v. United States, 73 F. 2d 861 (C. C. A. 10, 1934);

Jenkins v. United States, 59 F. 2d 2 (C. C. A. 5, 1932) (cert den., 287 U. S. 628);

People v. Gallagher, 107 Cal. App. 425, 290 Pac. 504;

State v. Hughes, 43 N. M. 109, 86 P. 2d 278;

State v. White, 46 Idaho 514, 266 Pac. 415.

Alexander v. State, 66 Okla. Cr. Rep. 5, 89 P. 2d 332.

Along these same lines the Trial Court further committed error by failing to charge the jury conversely to the manner in which the jury was in fact charged. Thus, at no point in the instructions was the negative of the Government's position put forth with respect to any of the substantially deciding issues presented to the jury. As part of the instructions, a criminal defendant is entitled to have the converse of controlling instructions given for his benefit.

Little v. United States, 73 F. 2d 861 (C. C. A. 10, 1934);

Davis v. State, 214 Ala. 273, 107 So. 737;

Smith v. Commissioner, 262 Kan. 6, 89 S. W. 2d 3;

People v. Hoefle, 276 Mich. 426, 267 N. W. 644;

Commonwealth v. Kluska, 333 Pa. 65, 3 A. 2d 398.

VII.

The Evidence Does Not Substantiate the Allegations in the Indictment With Respect to the Existence of an Interstate Flow of Commodities, nor Is the Evidence With Respect to Interstate Commerce Sufficient to Sustain the Judgment.

A. The Evidence Is Insufficient to Establish the Allegation in the Indictment That Plumbing and Heating Supplies Were Purchased in Response to Specific Prior Orders From Appellants.

One of the most important portions of the indictment is contained in Paragraph 15 in the following language:

> "Substantial quantities of plumbing and heating supplies are purchased from out-of-State sources by the said Southern Nevada wholesalers in response and pursuant to prior orders placed with said wholesalers, by plumbing contractors, and upon receipt of said supplies from out-of-State sources said supplies are immediately delivered to plumbing contractors who ordered the same." [Tr. pp. 8-9.]

Only two Southern Nevada wholesalers testified in support of the allegation in the indictment quoted above: representatives from Standard Wholesale Supply and Gordon Wholesale Supply.

It was the testimony of the representative from Standard Wholesale Supply that his company sold approximately 60% of all the plumbing material sold in the Southern Nevada area. With respect to the specific issue of purchases by his company in response to prior orders placed by plumbing contractors, however, it was his testimony that over 90% of all orders were delivered to appellants from the stock of the company, the back

orders comprising only 7.3% of the total. [Tr. p. 469; Govt. Ex. 38.]

With respect to the allegation that upon receipt of merchandise from out-of-state sources the supplies are immediately delivered to the plumbing contractors who ordered the same, it was the testimony of the representative of this company that it was frequently the case that even within this 7.3%, the contractor who had ordered the materials no longer took the goods, having filled his needs either from another supplier or by a substitution. [Tr. p. 470.]

In this company's experience, moreover, the testimony was that the goods purchased from out-of-state normally stayed on the company's shelves for substantial periods of time—some for as long as ten years, although the normal turnover was three to six times per year. [Tr. pp. 476, 1074.]

The representative from Gordon Wholesale Supply, the only other Nevada wholesaler whose testimony was involved in this case, provided no light whatever on this issue. The representative did not know the place of delivery of any of the goods ordered, had no knowledge of the manner of shipment, what was done with the supplies, nor how long they remained on the shelves prior to delivery to the plumbing contracts. [Tr. p. 593.]

No evidence of any kind was adduced with respect to purchases in response to prior orders from plumbing contractors or the delivery to plumbing contractors of any such materials. Thus the record is completely devoid of any substantial evidence to sustain the contention that "substantial quantities" of supplies were purchased by Nevada wholesalers in response to prior orders

of plumbing contractors and that upon receipt of such supplies they were immediately delivered to the ordering contractor. On the contrary, an extremely small percentage was shown to be involved in this matter and, even with respect to this small percentage, the evidence indicates that an even smaller amount in fact was delivered to the plumbing contractor ordering the same. The record with respect to the amount which may be said to be in this category is so indefinite as not to justify a finding that beyond any reasonable doubt this allegation of the indictment was true.

B. The Evidence Is Insufficient to Sustain the Allegation of the Indictment That Substantial Quantities of Supplies Are Shipped From Out-of-state Sources Directly to a Job Site.

Another of the vital allegations in the indictment is contained in Paragraph 16 which reads as follows:

> "Substantial quantities of plumbing and heating supplies are shipped from manufacturers, wholesalers or other sources outside the State of Nevada, directly to the job site or place where the same are installed by plumbing contractors in Southern Nevada." [Tr. p. 9.]

Despite the fact that as demonstrated by the sheer bulk of the exhibits introduced by the Government, a wealth of material was available and was introduced, the record is almost barren of any evidence which would substantiate the quoted portion of the indictment. Not only did the various witnesses on behalf of the Government throw no light upon this subject but their testimony was positive in many instances in denying that materials were sent from out-of-state sources directly to the job

site. [Tr. pp. 368, 370, 371, 388, 389, 390, 392, 404, 431, 446, 584-585, 618-620.]

The record contains two specific items of evidence with respect to this allegation. One of these specific items concerns testimony by the representative of J. M. Ritter Plumbing & Heating Company (which company was not involved as a defendant in this case). The testimony was that there were four items during the indictment period which "appear" to have been delivered directly from out-of-state sources to the job site. [Govt. Ex. 79.] These items total the sum of $1,407.66. [Tr. pp. 623-624; Govt. Ex. 79.] During the same period of time, this representative from the Ritter Company testified, the total amount of outside purchases during the same period was $66,314.19. Thus the particular specific evidence amounts to testimony that for the period of the indictment, 2% of the purchases of the Ritter Company were shipped directly to the job site. *This is the sole testimony involving a specific amount in which any Nevada plumbing contractor was involved, and this contractor was not a defendant.*

The other specific bit of evidence involved a shipment of $42,801.53 worth of materials directly to the job site of the Las Vegas Thoroughbred Racing Association job. Although this amount is specific and the testimony equally specific with respect to its shipment, the plumbing contractor involved was not a Nevada contractor, but was from Los Angeles, California, and the time of shipment was not established as being within the indictment period. [Pltf. Ex. 4; Tr. pp. 994-995.]

Thus the record is completely silent as to any transactions in which any of the appellants were involved which would substantiate the allegation of Paragraph 16

of the indictment. Even apart from appellants, the testimony involves insignifiant amounts of material shipped directly to the job site and contrasts strongly with the evidence that the almost invariable practice in the shipping of plumbing and heating materials was that they were sent directly to the place of business of the plumbing contractor, there to remain for varying lengths of time.

C. The Evidence Is Insufficient to Sustain the Allegation in the Indictment That the Plumbing and Heating Supplies Flowed in a Continuous Uninterrupted Stream Across State Lines to the Place of Installation.

The third vital element of the indictment dealing with the subject of the interstate commerce is to be found in Paragraph 17 of the indictment:

> "Said plumbing and heating supply flowed in a continuous uninterrupted stream from their points of origin in states other than Nevada to their places of installation and use in buildings in Southern Nevada." [Tr. pp. 9, 10.]

The discussion under Subdivision *B* above may well be incorporated at this point, for the evidence with respect to a "continuous, uninterrupted stream" clearly substantiates appellants' position that the stream concept does not reflect the true state of facts. If analogies are to be indulged, the record reveals no continuous moving stream, but rather a series of dams out of which from time to time flow commodities which have been intermingled with other commodities which have remained dammed up for varying periods of time.

Few of the witnesses who testified on behalf of the Government had any knowledge as to the length of time during which the commodities which had commenced their journey from another state reposed on the shelves of plumbing contractors within the State of Nevada or on the shelves of Nevada wholesalers of plumbing and heating supplies. [Tr. pp. 343, 369, 371, 391, 431, 446, 456-457, 477, 584-585, 593-596, 620.]

The few witnesses who hazarded a guess with respect to the "flow" of these materials testified that such materials remained on the shelves of plumbing contractors for substantial and varying lengths of time. [Tr. pp. 476, 584-585, 620, 1074, 1081.]

Thus the allegation with respect to "continuous uninterrupted streams" from out-of-state sources to places of installation is completely without foundation from any evidence in the record. When it is recalled that the test which the jury was required to apply for a conviction was that the evidence convinced them beyond any reasonable doubt that allegations such as this one which go to the heart of the indictment were true, it is apparent at once that the judgment cannot be sustained.

Moreover, the record is replete with uncontradicted testimony both from Government witnesses and appellants that in all instances the plumbing and heating supplies were not installed in the form in which they were received from out-of-state sources. In each instance the supplies, such as valves, fittings, etc., had to be combined with other supplies before they became use-

ful; the various lengths of pipe had to be cut, fitted and treated before installation; the processing of the various plumbing and heating supplies could take place either on the job or in the shop of the plumbing contractor depending upon the nature of the work and the facilities in each contractor's shop. [Tr. pp. 392, 447, 572, 586, 943-944, 1075, 1232.]

Thus the allegation with respect to the movement of the plumbing and heating supplies is completely without foundation in the evidence. Evidence of any substantial nature goes instead to indicate that, except for insignificant instances, plumbing and heating materials purchased from outside the state remained on wholesalers' or plumbing contractors' shelves for various periods of time; that they were then intermingled with other supplies which had remained on the shelves for other varying lengths of time; and that the supplies were finally processed, fabricated, changed and altered into the final plumbing or heating system which constituted the true stock-in-trade of the plumbing contractor. The ultimate consumer thus paid for and received not specific items of plumbing and heating materials but a completed system fabricated by contractors utilizing their years of experience and skill from materials whose time of origin from out-of-state sources was unascertainable as soon as it was mingled with like goods upon the shelves of the wholesalers and contractors.

VIII.

The Evidence Is Insufficient to Sustain the Allegation in the Indictment That a Conspiracy to Violate the Sherman Antitrust Act Existed Among Appellants.

Naturally, the gist of the charge against appellants was a conspiracy among themselves to violate the Sherman Antitrust Act in the manner set forth in the indictment. Without this concert of action there would of course be no crime since it is not the action of any one individual but rather the unified action of several which constitutes the offense. The judgment of *"guilty,"* therefore, necessarily carries with it a finding that such a concert existed. The evidence, however, not only points as strongly in the direction of innocence, but even more, lacks that degree of certainty with respect to the issue of the existence of a conspiracy which would justify a jury of reasonable men in finding that a conspiracy existed beyond any reasonable doubt.

The first witness, Walter Bates, testifying with respect to the alleged conspiracy, set forth in an early point in his testimony the complete theory of the Government: that an association was formed by appellants for the purpose of allocating among its members the various plumbing jobs which became available; that a central estimating bureau would fix a price which the plumber to whom the job was allocated would quote to the prospective customer; that other members of the conspiracy would then submit fictitious higher bids to encourage the customer to accept the bid of the plumber to whom the job had previously been allocated by the association; and that the Labor Union having jurisdiction over plumbers would restrain its membership from working for any

plumbing contractor who did not conform with this arrangement. [Tr. pp. 521-531.]

Despite this testimony, however, he readily admitted, on cross-examination, that no such committee was ever established at any meeting that he attended and that he had no direct knowledge of any such committee other than a general discussion among members of the Association. [Tr. p. 560.]

Another prop supporting the testimony of a conspiracy as alleged was necessarily an agreement that all of the members of the conspiracy would adhere to the price estimate supplied them by the central estimating bureau allegedly established by the association, and Mr. Bates testified that that was the arrangement. [Tr. p. 521.] Yet, on cross-examination, Mr. Bates admitted that there was no obligation to accept the estimate supplied by the central estimator and that each member was free to use his own discretion with respect to the price actually bid for any job. [Tr. p. 577.]

The next Government witness, Jack Swan, was the person employed as the central estimator himself, and his testimony should have established clearly the existence of a conspiracy, as outlined by the indictment. Mr Swan produced his record book which supposedly contained the conclusive proof that the allocation system existed and had been set up—which document, Exhibit 58, was invested with such importance by the United States Attorney that he found it necessary to transform its color from a blue book to a "little black book" to shroud its existence in an aura of villainy. [Tr. p. 1378.] Exhibit 58, Mr. Swan testified, contained a list of the various jobs which the Allocation Committee of the Association

had allocated to one or another members of the Association and the evidence of this allocation was that, although a job listing might contain several names of plumbing contractors, one of these names was circled and it was this person to whom the job had been allocated. [Tr. p. 651.]

Once again, however, the witness completely reversed his testimony on cross-examination and stated that the circle was actually made by him *after* he learned who had obtained the job rather than the person who had been allocated the job in advance. [Tr. p. 675.]

Mr. Swan further destroyed the conspiracy theory of the Government by stating that during the time that the alleged compulsory allocation and price fixing system was in existence, there were many jobs performed by one or another member of the Association which he did not estimate. [Tr. p. 680.]

The next Government witness, Ivan Larkin, further illustrates the diaphanous nature of the evidence relating to the alleged conspiracy. Mr. Larkin was an alleged co-conspirator with appellants, although unindicted, and therefore should have been in a position to give direct testimony with respect to the various elements of the conspiracy. His testimony commenced with a most positive assertion that an allocation committee was in existence during the time that he was a member of the alleged conspiracy. [Tr. p. 803.] Yet, in almost the same breath, Mr. Larkin testified that his knowledge of such committee was not direct but only hearsay since he himself had never attended any meetings of this committee and had no direct observation of its functioning. [Tr. p. 823.]

As an example of the working of the alleged conspiracy, Mr. Larkin testified with respect to a specific instance in which an allocation had been made: The allocation of the "Ward & Ward" job to appellant Jack Hynds. [Tr. p. 807.] Later testimony developed, however, that this job was not performed by anyone, and that no contract for its performance was in existence. [Tr. p. 958.] In fact Government Exhibit 58 reveals that, despite the testimony of Mr. Larkin that all had agreed that Mr. Hynds should have this job, a bid even lower than that of Mr. Hynds was made by Mr. Nay.

Mr. Larkin further destroyed the substantiality of any proof of the conspiracy as alleged in the indictment by stating that there was no compulsion that he knew of requiring him to use the bid obtained by the central estimating bureau which had been set up by the Association. [Tr. p. 816.]

The next Government witness, J. M. Ritter, was another unindicted co-conspirator in the alleged conspiracy. Once again one would expect from such a witness direct and positive evidence with respect to the nature of the conspiracy, the existence of its manifestations and the compulsory qualities alleged. Yet, Mr. Ritter knew only that there was "supposed to be" an Allocation Committee and had no testimony other than such a vague guess to substantiate his opinion. [Tr. p. 939.]

Contrary to the indefinite nature of his testimony with respect to the existence of the conspiracy, however, he testified positively that there was never any interference from the Association or from the Trade Union on any job which he had done [Tr. pp. 957, 958] and in addition that there was no compulsion upon him to follow the

estimate which he received voluntarily from the central estimating bureau. [Tr. p. 957.]

This testimony from Government witnesses was then followed by two of the defendants, Bernard V. Provenzano and James T. Humphrey, the testimony of both of whom was completely consistent with the testimony given by Government witnesses.

Mr. Provenzano testified that not only was there no conpulsion for him to use the price submitted by the central estimating bureau but in fact that he had *never* used the estimates obtained from Mr. Swan on any job which he had bid. [Tr. p. 1160.] This witness gave at some length and detail the differences between the estimates as shown by Mr. Swan in Exhibit 58 and the bids which he, an alleged conspirator, actually made on the various jobs. [Tr. pp. 1178-1185.]

Mr. Humphrey testified that he did in fact receive estimates from Mr. Swan of the central estimating bureau but that of the 63 jobs which he had completed during the indictment period, he received his estimates on only two occasions and did not follow them on any occasion. [Tr. pp. 1268, 1270.]

Thus the entire proof adduced by the Government to substantiate the indictment is to the effect that a central estimating bureau was set up by the Association for the purpose of providing a standard which the various members of the Association might use if they so desired. The evidence also shows that a record was kept by the Association of the plumbing contractor who actually obtained the

job together with some of the bids which had been made by various contractors on these jobs. The Instructions of the Court themselves, moreover, demonstrate that the Government agrees with appellant that no violation of the Sherman Antitrust Act can be spelled out from the existence of such a central estimating bureau or the submission of estimates by such bureau to be used as a guide by members of an association. [Instructions Nos. 19, 20, Rep. Tr. pp. 123, 125.] Yet, not only is the record devoid of any evidence that an allocation committee was in existence or that members of the alleged conspiracy agreed to follow the estimates of the central bureau but the record affirmatively shows that there was a complete lack of compulsion to follow such estimates and, in fact, in the great majority of cases, such estimates were not submitted as the bid at all.

What remains, therefore, in the record is no conspiracy to fix prices by the method outlined in the indictment but a perfectly legitimate trade association which has established a central estimating bureau paid for by members of the Association to obtain a guide for the individual and independent actions of the members of the Association. The evidence with respect to the conspiracy as alleged in the indictment certainly falls far short of that calibre which an appellate court may say could have convinced a jury beyond a reasonable doubt of the existence of a criminal conspiracy.

IX.

The Trial Court Committed Prejudicial Error in Admitting Testimony Pertaining to a Conspiracy Without Prima Facie Proof of Such Conspiracy Apart From Such Co-conspirators' Testimony.

As indicated by the indictment, the charge was one of a conspiracy to violate the Sherman Antitrust Act by the defendant individuals and associations. It is, of course, clear that where the gist of the offense charged is a conspiracy to commit a crime, the conspiracy must be established *aliunde* the testimony of any co-conspirator before such co-conspirator's testimony may be considered by the jury.

Glasser v. United States, 315 U. S. 60, 74-75.

The holding of this case, repeated many other times, finds its rationale in the fact that hearsay testimony given by co-conspirators may be elevated to the level of admissible testimony only if there has first been established a conspiracy and, if in addition, both the defendants and the testifying co-conspirator have been connected with that conspiracy. To expand this exception to the Hearsay Rule would result in a situation in which "* * * hearsay would lift itself by its own boot straps to the level of competent evidence."

Glasser v. United States, 315 U. S. at 75.

The record in the instant case demonstrates clearly the evils which this rule was designed to eliminate. The only testimony contained in the record with respect to an alleged conspiracy is that given by alleged co-conspirators. At no time was evidence offered or introduced to establish the existence of a conspiracy or the connection of defendants with such conspiracy other than the testi-

mony of the alleged co-conspirators. This testimony concerned itself with statements allegedly made by persons at meetings and by which appellants were supposedly bound on the theory that all were part of the same conspiracy. Yet the record is barren of any evidence other than such declarations purportedly made in the presence of some of the appellants to substantiate even partially the existence of any such conspiracy.

While the Trial Court instructed the jury (Instruction No. 14) that the act or declaration of each member of a conspiracy may bind the other members of the conspirators when the existence of such conspiracy has been shown, it is submitted that by the very nature of the charge and the proof in the instant case such a generalized instruction could not have impressed the jury with the rules of law set forth above and thereby eliminated the prejudice suffered by appellants in the admission by the Court and the consideration by the jury of such evidence.

> "When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence all acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is concerned with a hodge-podge of acts and statements by others which he may never have authorized or intended or even known about, but which helped to persuade the jury of the existence of the conspiracy itself. *In other words, a conspiracy often*

is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, *cf. Blumenthal v. United States,* 332 U. S. 535, 559, 68 S. Ct. 248, 257, all practicing lawyers know to be unmitigated fiction. See *Skidmore v. Baltimore & Ohio R. Co.,* 2 Cir., 167 F. 2d 54." (Mr. Justice Jackson concurring in *Krulewich v. United States,* 336 U. S. 440, 450.) (Emphasis supplied.)

X.

The Trial Court Committed Prejudicial Error in Stating, in the Presence of the Jury During the Course of the Trial, That the Evidence Theretofore Submitted Demonstrated That a Conspiracy Had Been Proved.

At a relatively early point in the trial the Court, in ruling upon the admissibility of certain third party declarations, made the following statement during the direct examination of one of respondent's witnesses, Walter B. Bates:

"Q. And what were the circumstances of your making these bids? A. Well—

Mr. Schullman: Objected to for the reason it is entirely hearsay, immaterial, and not binding on any of the defendants in this case.

The Court: I understand that this was a meeting that took place at this second meeting?

Mr. Howland: No, your Honor, I am not asking anything about a meeting. The question was what were the circumstances under which he submitted bids to this firm of Franklin & Law on certain jobs? It is purely preliminary.

The Court: I think I see the point of your objection. I would say that there has been evidence here tending to show that there is at least a concert here. That is one of the points you have in mind?

Mr. Schullman: Yes.

The Court: There is evidence here showing that there has been—I don't want to use the particular words—but you might say an agreement of some kind, the Association." [Tr. pp. 537-538.]

Shortly thereafter the Trial Judge in effect adopted a statement, made by the United States Attorney, which once again underscored to the jury the acceptance by the Court of the proposition that there had been established a conspiracy among the defendants:

"Q. Do you know to whom the Clark job had been allocated? A. Mr. Ritter told me that Mr. Jacomini—

Mr. Schullman: Objected to as hearsay.

The Court: I think it would be hearsay.

Mr. Howland: If the Court please, if I may suggest, any statement made by Mr. Ritter to his employee, based upon the *prima facie* evidence of a conspiracy that has been adduced heretofore, would be admissible in accordance with the well known exception of the hearsay rule. There is evidence in this record that the first meeting of which we ever heard was in Mr. Ritter's quarters. There is evidence that Mr. Ritter at one time was on the Allocation Committee himself. There is evidence in the record of Mr. Ritter's attendance at other meetings concerning which testimony has been made.

The Court: I recollect that now. Objection overruled. Answer the question." [Tr. pp. 764-765.]

Naturally, the very question at issue in this trial was whether or not an agreement had been arrived at among appellants as charged in the indictment. Appellants earnestly contradicted any such conclusion and much of their evidence was directed toward the disproof of this assertion. The above-quoted statements on the part of the Judge naturally must have influenced the jurors, since it was obviously a judicial determination to establish that there was an agreement among the appellants as alleged in the indictment. Since these statements came at a very early point in the trial, the Trial Judge thus established a framework for the jury's reception of the entire evidence in this case. For this reason a general instruction of the nature given by the Court in Instruction No. 37 could hardly have wiped out the substantial prejudice which had already been created.

An identical situation was presented to a New York court and a closely similar remark by the court was properly held to be sufficient ground for a reversal of a conviction. In that case, *People v. Jackson,* 291 N. Y. 45, 52 N. E. 2d 945, there was a conviction of three individuals on a charge of murder. The prosecution's theory was that there was a conspiracy among three defendants to commit the murder. The following interchange took place at the time of trial:

> "Q. When you saw the three defendants come out of the house and go over from Herkimer Street to Albany Avenue, did you hear something said; yes or no? A. I did.
>
> Q. Tell us what you heard.
>
> Mr. Kopff (counsel for the defendant Mumford): I object to it.

Miss Barnard (counsel for the defendant Green): Objection on the part of John Green.

Mr. Leibowitz (counsel for defendant Jackson): I further object unless the witness can say which one of the defendants said anything.

The Court: I will permit the witness to state what was said by any one of the three. If the statement came from any one of the three I will permit it irrespective as to whether or not he can tell which one said it.

Mr. Leibowitz: I respectfully except.

The Court: On the ground there is a continuing conspiracy at that particular time."

The New York Court of Appeals, in reversing the conviction, obtained under this interchange, held as follows:

"Whether a conspiracy existed among the three defendants to accomplish Eason's death became one of the principal questions of fact to be determined. . . . We cannot say that the jury's finding upon the important question of fact—whether the defendants conspired together to kill Eason—was not influenced by the language of the trial judge, who in his ruling stated that he would permit Bey to testify as to what he heard 'irrespective of whether or not he can tell which one said it . . . on the ground *there is a continuing conspiracy at that particular time.*' We think the words italicized in the ruling last quoted above were prejudicial to the defendants' substantial rights. They related to an important phase of the case. They were spoken by the Court at a critical point in the trial and may well have led to the jury's finding upon a question of fact which was exclusively for its decision." (291 N. Y. 458-459.)

XI.

The Trial Court Committed Prejudicial Error in Instructing the Jury With Respect to the Presumption of Innocence.

Instructions Nos. 4, 5, 6 and 8 concern themselves with the subject matter of the presumption of innocence and the definition of proof of guilt beyond a reasonable doubt.

Instruction No. 4 charges that the "defendants are presumed to be innocent at all stages of the proceeding until the evidence introduced on behalf of the Government shows them to be guilty beyond a reasonable doubt."

Instruction No. 6 charges the jury that the presumption of innocence "is not intended to shield those who are actually guilty from just and merited punishment, but is a humane provision of the law which is intended for the protection of the innocent, and to guard, so far as human agencies can, against the conviction of those unjustly accused of crime."

Instruction No. 8 charges the jury that "you are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt as the same has been defined to you without it being restated or repeated."

The language of Instruction No. 4, by charging that the presumption of innocence exists during the proceeding "until the evidence introduced" shows guilt beyond a reasonable doubt, robbed appellants of this presumption during every portion of the trial, including the de-

liberations of the jury. The plain wording of this instruction requires the jury to discard the presumption of innocence if at any time during the trial they might feel that the evidence at that point had indicated the defendants to be guilty beyond a reasonable doubt. The instruction as given certainly did not indicate to the jury that during their deliberations in the jury room the presumption of innocence remained in full force and effect. In fact, as a practical matter, the presumption of innocence first comes into play after both sides have rested and the jury has retired. Similar instructions have been held to be error:

> "The Court instructed the jury that 'the law in addition to that presumed all persons innocent of the offense with which they are charged *until such time* as the proof produced by the Government establishes their guilt to the exclusion of a reasonable doubt.' It is difficult to apprehend what interpretation may be placed by the jury upon the phrase 'until such time.' If it carries to the mind the connotation that guilt is established at the conclusion of the government's proof, then the burden of proof has been shifted to the defendant. The presumption of innocence remains throughout the trial, and it may well be that a juror's conviction of guilt upon consideration of the Government's proof alone is either completely shattered or diluted by a reasonable doubt when the defense has had its say." (179 F. 2d 422.)

In *People v. McNamarra,* 94 Cal. 509, 29 Pac. 953, the Court instructed the jury on the question of presumption of innocence as follows: "This defendant, like all

other persons, accused of crime, is presumed to be innocent until his guilt is established to a moral certainty and beyond any reasonable doubt, and this presumption of innocence goes with him all throughout the case, until it is submitted to you." In holding this instruction erroneous the Court commented:

> "The presumption of innocence does not cease upon the submission of the cause to the jury, but operates in favor of the defendant not only during the taking of the testimony, but during the deliberations of the jury, until they have arrived at a verdict." (94 Cal. 514.)
>
> "There is, of course, no question that the presumption of innocence remains with the party on trial until a verdict of guilty is reached. . . . If it ceased prior to that moment, it would be no value to a defendant and would be no more than a mockery and a sham." (*People v. Anderson,* 58 Cal. App. 267, 274, 208 Pac. 324.)

The charge set forth in Instruction No. 6 has likewise been held to be an incorrect statement of the law. In discussing a similiar instruction, the Court in *Gomila v. United States,* 146 F. 2d 372 (C. C. A. 5, 1944), commented as follows:

> "The presumption of innocence applies alike to the guilty and to the innocent, and the burden rests upon the Government throughout the trial to establish, by proof beyond a reasonable doubt, the guilt of the accused. Until guilt is established by such proof the defendant is shielded by the presumption of innocence. The fact of guilt does not enter into the application of the rule, the intent and purpose of

> which is to protect all persons coming before the court charged with crime until the presumption of innocence is overthrown by evidence, establishing guilt beyond a reasonable doubt, and, where the evidence is purely circumstantial, to the exclusion of every reasonable hypothesis of innocence." (146 F. 2d at 373.)

Coming after the instructions cited above containing the errors here noted which served to remove from appellants a substantial portion of the guarantees provided by the presumption of innocence, the language of Instruction No. 8 served only to further prejudice appellants' rights. An instruction had already been given defining reasonable doubt and two had already been given upon the presumption of innocence. This additional instruction added to these definitions a weakening of the presumption of innocence and the standard of proof required for conviction. By the terms of this instruction, which seems to modify the requirement that the Government establish guilt beyond a reasonable doubt, the jury was instructed that they might find guilt upon something less than the moral certainty of appellants' guilt.

While no one of these errors may, when standing alone, have been sufficient to have denied substantial rights to appellants, we submit that when taken together the full force and effect of the presumption of innocence and the requirement that the jury find appellants guilty beyond a reasonable doubt was denied appellants in the charges to the jury.

XII.

The United States Attorney Was Guilty of Prejudicial Misconduct in His Closing Argument to the Jury in Referring to the Nature of the Punishment for the Offense for Which Appellants Were on Trial.

The United States Attorney, in his closing remarks to the jury, referred with some emphasis to the nature of the punishment involved in connection with the offense for which appellants were on trial. The purport of the remarks set forth below was obviously an attempt to convey to the jury that they should not regard too seriously a conviction of guilty, since the punishment was really so trivial:

> "As my friend, Mr. Schullman, pointed out this afternoon, the use of the word 'conspiracy' is no crime. The Court will instruct you that in an anti-trust case there is no specific criminal intent necessary. *The offense against the anti-trust laws is not a felony.* But that is not required, what lawyers call criminal intent. You all know that in a murder case it must be proved, not only was the murder committed, but it was committed with malice aforethought. That is not involved here. We have here a statute which more than sixty years ago *Congress enacted to be a misdemeanor. You have many ordinances in your own communities which are misdemeanors. One of the ones which all of us run afoul of most frequently perhaps is overrunning a stoplight with an automobile.* Now it doesn't make any difference whether you went through the *red light* and whether you saw it or didn't or intended to violate the law or didn't, doesn't make any difference. If a law enforcement officer sees you doing it, he gives you a ticket *and you are charged with a misdemeanor,* a violation of an ordinance, which says you should not go through a *red light.*

"The Sherman Act is *simply* an act reserving (*sic*) competition in business where there is an effect upon interstate commerce.

"*It gives a green light* to businessmen who act independently of each other in fair and open competition, *and it gives a red light* to combinations and associations of businessmen who act collectively and in concert to suppress competition of others." (Emphasis added. [Tr. pp. 1450-1451.]

The impact of the quoted words in reducing a charge of criminal conspiracy under the Sherman Act to the status of a traffic violation may well have had a considerable effect upon the jury's determination. Instead of arguing to the jury, as should properly have been done, the Government's view of the evidence in as forceful a manner as he saw fit, the United States Attorney sought to divert the minds of the jury from the seriousness of the charge by an analogy to an experience in the everyday lives of the jurors which is not regarded by most people as a crime. The constant reference in the cited passage to traffic violations, misdemeanors, green and red lights, could only have meant to the jury that the punishment which would be meted out to appellants would be simply a nominal or reasonable fine rather than any serious consequences. In their deliberations the jurors might very well have taken this into consideration to resolve some of their doubts in favor of conviction, where in the absence of such a concept the Government might have been held not to have established its proof beyond a reasonable doubt.

Unfortunately, references to the degree of punishment or sentence involved in a particular case for a particular

defendant by prosecuting attorneys are not novel in criminal law cases. Indeed, it seems almost as though the device is utilized consciously to help bolster a prosecution case otherwise somewhat tenuous. Uniformly, however, courts have held such references to be misconduct and in a substantial number of cases to be prejudicial error.

Thus, in *People v. Klapperich,* 370 Ill. 588, 19 N. E. 2d 579, the State Attorney's closing argument included a reference by him to the possibility of the defendant's being put on probation in the event of a verdict of guilty. The Court held:

> "Neither counsel had any right to argue the effect of the verdict of the jury in those cases where the jury has nothing to do with fixing the punishment. In such cases the statutes as to punishment and probation have no relation to the trial of a criminal case. The effect of the argument of the State's Attorney may well have influenced the jury in arriving at a verdict of guilty. The argument was error." (370 Ill. at 593-594.)

In *Davis v. State,* 200 Ind. 88, 161 N. E. 375, the prosecuting attorney urged the jury in his closing remarks to convict the defendant and argued that if the Trial Court believed a mistake had been made it could grant a new trial and that if the Trial Court did not the defendant had the right to appeal the case to the Supreme Court and to the Governor for a pardon. This was held to be error on the ground that it ". . . transcends the bounds of proper argument and is calculated to induce the jury to disregard their responsibility." (200 Ind. at 111.)

See also to the same effect:

People v. Ramiriz, 1 Cal. 2d 559, 36 P. 2d 628.

XIII.

The United States Attorney Committed Prejudicial Misconduct by Referring in His Closing Remarks to Evidence Allegedly Known by Him in His Official Capacity but Which Was Not Introduced into or Contained in the Record.

The United States Attorney in his closing remarks to the jury saw fit to inform the jury about two incidents which were not a part of the record and which may very well have had a substantial effect upon the jury in their deliberations. It is significant that both of these incidents involved matters which would have come to the United States Attorney in his official capacity and were therefore calculated to cause the jury to give weight to their supposed occurrence.

The first of such incidents was the United States Attorney's reference to the manner in which the indictment brought against the appellants had been initiated. His remarks to the jury were as follows:

> "We are here today because something happened, which happens before any anti-trust prosecution is brought into the court, and that is *a citizen of this State made a complaint. He went to the local office of the Federal Bureau of Investigation and said, 'Here are some facts as I know them. I am not getting a square shake. There is something wrong, there is something rotten in Denmark. Will you look into it for me?'* The Federal Bureau of Investigation, as you all know, does the investigating work for the entire Department of Justice, of which the Anti-Trust Division is only one of five sections. That complaint was investigated, it was processed, went through the Attorney General's office in Wash-

> ington, and in due course came to my office in San Francisco, for the reason that my office has jurisdiction over the State of Nevada as well as Northern California, and *that is why we are here today,* not because of Mr. McNeil, not because of political pressure, but because *some citizen complained, complained that he was being deprived of the benefits of free competition in the marketing and distribution of plumbing and heating supplies in the restraint of interstate commerce."* [Tr. pp. 1447-1448.] (Emphasis added.)

The record is completely devoid of the manner in which or the reasons for which the indictment was brought. Certainly an argument which states to the jury that the United States Attorney knows by reason of his office that the indictment was brought because a plain citizen of the State was being squeezed and maltreated by the appellants constitutes a strong prejudicial factor. The vision of a mistreated and harassed honest citizen bringing his woes to the Federal Bureau of Investigation for redress is a colorful and a persuasive argument. It does not, however, constitute a comment upon the evidence of the case nor a portion of any part of the Government's theory of the case. It is rather a naked appeal to the prejudice of the jury and one designed to cause them to give weight to factors other than those which are to be found in the record itself.

The second instance of this kind of misconduct is to be found in the United States Attorney's comments upon a particular exhibit in evidence [Ex. 99]. This exhibit was a particularly important one in that around it revolved the question of the truth of certain testimony given by one of the appellants, Mr. Provenzano. Mr.

Provenzano had testified that he had not submitted a bid on a particular job. [Tr. p. 1252.] A Government witness contradicted this testimony and stated that he did in fact receive a telephone call from Mr. Provenzano making an oral bid on the job and that he had made a written note of this bid. [Tr. pp. 1302-1303.] It was this written note containing bids on the particular job which constituted Exhibit 99. As part of the cross-examination of this Government witness doubt was cast upon his testimony because of the manner in which his signature had been placed at the top of the sheet. No explanation of this signature was given either on direct or redirect examination of this witness. Nevertheless, in his closing remarks to the jury, the United States Attorney made the following statement:

> "Now don't get fooled by his signature at the top. When I got this paper from Mr. Longley some six weeks or more ago, long before I knew Mr. Provenzano would have the temerity to sit here and testify, under oath, that he had made no such bid, simply because it was just a memorandum sheet of paper, I asked Mr. Longley to put his signature on it so he could, at a later date, identify this piece of paper and that is how come the name L. A. Longley on the top side. It is a standard practice of law." [Tr. pp. 1464-1465.]

Citation of authority is not needed for the proposition that it is misconduct for a prosecuting attorney to refer to evidence which is not in the record and particularly to refer to evidence which he represents as being within his own personal knowledge but which has not been made a part of the record.

Such misconduct, however, becomes greatly magnified when it is perpetrated by a United States Attorney with respect to evidence which he claims to have received by virtue of his official position with the United States Government. The awe for an official of the United States Government and the official processes of the United States Department of Justice which citizens of the United States generally feel would cause such testimony to be carefully and seriously considered by the jury when in fact such testimony had no place in the jury room at all.

The commission of two such serious errors by the United States Attorney is a flagrant violation of the edict set forth by the United States Supreme Court in discussing the duties and responsibilities of a United States Attorney:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it should win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so, but, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States,* 295 U. S. 78, 88.)

XIV.

The Trial Court Erred in Refusing to Grant Appellants' Motion for a Continuance.

Two of appellants' counsel, Alexander Schullman and Richard Richards, were associated for the trial of this action within a very few days of the actual commencement of the trial. This fact was made known to the Trial Judge upon the calling of the case. [Tr. pp. 39-46.] These counsel pointed out to the Trial Court that their familiarity with the case was limited to a few discussions with other of appellants' counsel, and that they had had no opportunity to confer fully with their clients or to research the law in connection with the case. Perhaps the clearest indication of the full extent of the prejudice suffered by appellants because of this denial of the motion for continuance is to be found in an examination of the exhibits submitted on behalf of respondent. Even a casual glance at the exhibits will indicate by their very number and bulk that an attorney would necessarily require many, many days of intensive work before he could acquire that familiarity with their contents that would permit adequate cross-examination and comprehension.

In a case which is built so substantially upon the contents of complex and detailed exhibits, it cannot be said that a defendant will receive adequate representation unless his counsel is permitted full opportunity to examine and digest the evidence which is to be used against him. The Sixth Amendment to the United States Constitution

guarantees to all accused the right to counsel, and this guarantee means effective counsel, which requires the opportunity for counsel to become fully familiar with the case so that an adequate defense can be made.

Powell v. Alabama, 287 U. S. 45 (1932).

The Trial Court's approach to this problem was that, since appellants were already represented by counsel who was familiar with the case, it was not necessary to grant a continuance for the two attorneys named above so that they could become familiar with the case. [Tr. pp. 323-324.] The two named counsel, however, were selected by appellants to try this case and whether other counsel were available or not, appellants had the right to select trial counsel and to expect that the attorneys of their own choice should be permitted the fullest opportunity to prepare themselves for the trial. Failure to permit a continuance under such circumstances, of course, goes to the very heart of appellants' rights to a full and fair trial.

People v. Dunham, 334 Ill. 516, 166 N. E. 97 (1929).

XV.

The Trial Court Committed Reversible Error by Its Hostile Treatment of Appellants' Counsel, by Its Rulings Prejudicially in Favor of Appellee, and by Its Interference With the Full Presentation of Appellants' Defense.

A. The Trial Court Committed Error by Its Hostile Treatment of Appellants' Counsel.

At a number of points throughout the trial, the Trial Judge treated one of the attorneys for appellants, Alexander Schullman, with marked asperity and hostility. This treatment was wholly unprovoked by Mr. Schullman, or any other counsel for appellants, and its total effect must have been to impress upon the jury that the Trial Judge at the very least regarded appellants' counsel with less favor than he did counsel for the Government. Some of these interchanges are set forth at this point:

"Q. Referring to Defendants' Exhibit B for identification, I would like to read the statement which I asked the witness to identify.

The Court: No, I do not want you to read anything not in evidence.

Mr. Schullman: May I be heard?

The Court: No, the ruling will stand.

Mr. Schullman: Well, your Honor, it is important—

The Court (interceding): Are you going to argue against my ruling?

Mr. Schullman: No, but—

The Court: No, I don't want you to argue with me or I will have to take some drastic steps with you. I will be obliged to do so. I do not want to

do it but I certainly will in a minute. Be quiet—sit down." [Tr. pp. 682-683.]

"Q. Do you know to whom the Clark job had been allocated? A. Mr. Ritter told me that Mr. Jacomini—

Mr. Schullman: Objected to as hearsay.

The Court: I think it would be hearsay.

Mr. Howland: If the court please, if I may suggest, any statement made by Mr. Ritter to his employee based upon the *prima facie* evidence of a conspiracy that has been adduced heretofore, would be admissible in accordance with the well known exception to the hearsay ruling. There is evidence in this record that the first meeting of which we ever heard was in Mr. Ritter's quarters. There is evidence that Mr. Ritter at one time was on the Allocation Committee himself. There is evidence in the record of Mr. Ritter's attendance at other meetings concerning which testimony has been given.

The Court: I recollect that now. Objection overruled. Answer the question.

Mr. Schullman: May I, for the record, since counsel has made a statement on the record in the presence of the jury—

The Court (interceding): I do not want any statements. No. I have ruled.

Mr. Schullman: May I ask permission of the court only for this reason—counsel has made a statement which the jury has heard—

The Court: Request is denied.

Mr. Schullman: I am asking for instructions. Then when counsel for the government makes a statement in the presence of a jury which I think is prejudicial, I cannot answer that, is that your Honor's position? I am asking for instructions from the

court. I will abide by the instructions, but I understand there is a statement made by the government in the presence of the jury which I deem to be prejudicial and inquire when I try to say something —the defendants are presumed to be innocent until the trial is over—I am stopped.

The Court: You are stopped now.

Mr. Schullman: Is that the instruction of the court?

The Court: That is the instruction.

Mr. Schullman: May I state on the record—

The Court: You may sit down. Proceed." [Tr. pp. 764-766.]

"Mr. Schullman: I now move to strike this letter from the record and ask the jury to pay no attention thereto for the following reasons: There is no evidence in the record now by any witness that this letter was ever given to, or mailed to, or received by any defendant.

The Court: Let me ask you a question. This is part of Exhibit 98?

Mr. Schullman: Yes.

The Court: And Exhibit 98 was admitted in evidence?

Mr. Schullman: Yes, Your Honor.

The Court: Therefore the motion to strike will be denied.

Mr. Schullman: May I defend my reasons?

The Court: No. Now please—

Mr. Schullman: Your Honor, I am entitled to under the law—

The Court: We will not proceed any further. The motion is denied.

Mr. Schullman: May I make a motion in the absence of the jury?

The Court: No, sir. Proceed. The motion is denied.

Mr. Schullman: Your Honor, may I ask the court a question?

The Court: No, sir. Sit down, please.

Mr. Schullman: Your Honor, may I be permitted to try this case?

(No response.)" [Tr. pp. 1032-1033.]

Naturally the Trial Judge occupies a position of great influence with the jury and any cue as to his feelings with respect to the conduct and nature of the case is magnified in the average juror's mind far beyond its real importance. The average juror is unfamiliar with legal proceedings, and to him the judge conducting the trial is something in the nature of an Olympian being removed from the partisan approach exhibited by the attorneys, and representing the impartial and all-powerful government. When, therefore, a trial judge demonstrates, as did the Trial Judge in this case, not only an impatience with counsel for one side as against the other, but beyond that, direct and outright hostility, there can be no question but that the jury must have been affected adversely to Appellants. The record can be searched in vain for any similar remarks made to counsel for the United States throughout the trial. A number of hostile utterances, in addition to those cited, are to be found and these taken together with the other examples cited in this Point XII indicate clearly that the trial was not had in the impartial atmosphere to which Appellants were entitled. Naturally the conduct of a trial by a

judge in any but a completely impartial manner renders a conviction reversible.

United States v. Levi, 177 F. 2d 833 (C. C. A. 7, 1949);

Lambert v. United States, 101 F. 2d 960 (C. C. A. 5, 1939);

United States v. Angelo, 153 F. 2d 247 (C. C. A. 3, 1946);

United States v. Andolschek, 142 F. 2d 503 (C. C. A. 2, 1944);

United States v. Minuse, 114 F. 2d 36 (C. C. A. 2, 1940);

Meeks v. United States, 163 F. 2d 598 (C. C. A. 9, 1947).

B. The Trial Court Committed Reversible Error in Rulings Which Exhibited Bias in Favor of Appellee.

Throughout the trial the Trial Court seemingly adopted a different standard with respect to rulings on evidence exhibiting a marked bias in favor of Respondent and against Appellants. Perhaps the clearest demonstration of this bias is to be found in the rulings with respect to motions to strike certain answers. The Court early in the trial laid down the rule for Appellants that he would not permit an objection to a question or a motion to strike unless it was made before the answer went into the record:

"Mr. Schullman: May I now make a motion to strike the questions and answers concerning the conversation between this witness and Mr. Swan and between this witness and Mr. Lott or Mr. and Mrs. Lott, on the ground it is not, and cannot be, binding on any defendants involved here?

The Court: Motion denied.

Mr. Schullman: May I interpose additional objection on the ground it is under the hearsay rule?

The Court: The motion comes too late. The questions had been answered.

Mr. Schullman: Is that the only reason for the denial?

The Court: That is one reason.

Mr. Schullman: I purposely withheld objecting because I wanted him to finish his inquiry.

The Court: The ruling will stand. Unless objections are properly made to questions the answers will not be stricken. In other words, we do not want to sit and listen to answers and then entertain motions to strike later." [Tr. p. 535.]

A few days later, however, the Court applied quite a different standard when it was the government which was seeking to have answers stricken from the record. Indeed, in the following interchange it will be noticed that the Court *on its own initiative* struck answers from the record even without a motion on the part of the government:

"Q. I will ask you whether or not, Mr. McDonald, during the period which is the latter part of the year 1950, wherein Mr. Alsup conducted certain activities with reference to the race track, negotiating contracts with the various master plumbers and plumbing contractors of Las Vegas, Nevada, negotiating wage and labor agreements, whether or not in all of those matters which transpired during that period he was authorized by the Executive Board of the local to take any such action? A. Yes.

Mr. Howland: I will object to that.

The Court: The answer may go out. Objection will be sustained. The answer will be stricken.

Q. Is it necessary, Mr. McDonald, that Mr. Alsup, as business agent, must report from time to time upon all activities taken by him as business agent to the Executive Board, the local? A. Yes, sir.

Mr. Howland: I will object to that, if the court please.

The Court: The answer will be stricken. Objection will be sustained." [Tr. pp. 1089-1090.]

C. The Trial Court Committed Reversible Error in Permitting Government Counsel to Make Statements in the Presence of the Jury With Respect to Their Theory of the Case While Hampering and Limiting the Same Conduct by Appellants' Counsel.

At a number of points in the trial government counsel were permitted to make statements in the presence of the jury which set forth the theory of the prosecution. When Appellants' counsel sought to counter the effect which this must have had upon the jury by a statement of Appellants' theory of the case, they were summarily cut off. When combined with the conduct of the Court set forth in the subdivisions immediately preceding this, the jury could not have helped but be influenced in their deliberations by the prejudicial attitude so clearly shown.

In the interchange cited directly below, perhaps the most important issue in the entire trial was commented upon unfavorably to Appellants by the Trial Judge. As indicated by the briefs on appeal, there is a substantial difference between Appellants' and Respondent's views of what constitutes interstate commerce for purposes of jurisdiction under the Sherman Act. In the quoted por-

tion it will be noted that, whereas the government's position is set forth at length, Appellants were not permitted to set forth their understanding of this issue or their position with respect to it:

"Mr. Howland: We object to this entire cross-examination. The indictment, if the court please, the indictment itself alleges and the government must approve, that these contractors bought these materials and installed them. Now we have to stop somewhere in a case of this complexity and magnitude and we have subpoenaed these suppliers to establish their general course of dealing with some companies by the volume of the business flowing across the State line into the State of Nevada. Now counsel by this line of questioning is endeavoring, I submit, to establish from these witnesses a negative fact, for which the government did not subpoena witnesses, concerning which they were not interrogated on direct examination and it is outside the scope of the purpose for which the government subpoenaed the corporation which employed this gentleman and upon which he was interrogated upon direct.

The Court: I notice this witness and all other witnesses who testified to similar facts, have testified that they had no knowledge of what became of the articles after they were shipped. I do not think there is any use arguing; the question has been answered.

Mr. Schullman: May I state with equal—

The Court (interceding): No, let it stand the way it is. We have heard each one of these witnesses testify he had no knowledge other than what was shown by the records and the records do not

show what was done with any of these articles or supplies after they left his establishment. I think it appears this witness does not know, and does not pretend to know, what became of it. The objection will be sustained.

Mr. Schullman: Your Honor, may I ask permission to now state—

The Court (interceding): No I would rather not have any statements.

Mr. Schullman: I think we are entitled to show our side of the case, Your Honor. May I have some statement on the side with counsel? I merely want to show a statement made by the government's attornew, which indicates we have no right to show our side of the case. I want merely to show that we do have a right.

The Court: Proceed: There is nothing before the Court now." [Tr. pp. 424-426.]

An interchange between Court and counsel which had the same import as that cited above has already been quoted at page 91 of this brief in which the Court in effect adopted the theory of the case set forth by the prosecution and not only rejected the defense's theory but even denied the right to present that theory to the jury in a manner similar to that which had just been utilized by the prosecution.

An interchange of a somewhat different character, quoted below, indicates that at an early point in the trial the Court not only had adopted the theory of the prosecution with respect to the nature of interstate commerce but in effect ridiculed the position taken by Appellants with respect to this issue. As indicated by the preceding

portions of this brief, it is on this appeal, and was at the time of trial, Appellants' contention that in order to justify a finding that Appellants were engaged in interstate commerce, it is necessary that there be substantial evidence showing a continuous flow of commodities across state lines to the ultimate user, and that the alleged acts of Appellants had a substantial and direct effect upon this continuous flow. It was the government's position at the time of trial that a sufficient showing on the issue of interstate commerce could be made by introducing documentary evidence and testimony to prove that Appellants had purchased goods across state lines, and had subsequently installed these goods within the State of Nevada without regard to the length of time elapsing between the purchase and the installation and without regard to any difference in form with respect to these goods.

Pursuant to this theory held by the prosecution, therefore, the government's *prima facie* case with respect to interstate commerce consisted largely of witnesses and documents designed to prove that Appellants had purchased a great majority of their plumbing and heating supplies outside of the State of Nevada. Consistent with their conception of interstate commerce on the other hand, Appellants' counsel at the trial sought to demonstrate to the jury that these goods, while purchased initially from outside the State of Nevada, had come to rest for long periods of time on the shelves either of Appellants or of wholesalers within the State of Nevada; that in an inconsequential number of cases were the goods shipped directly to the job site; and that, in any event, the goods as finally installed were fabricated and

changed substantially from their form upon importation from outside the state.

The Trial Judge made the following disparaging remarks with respect to Appellants' theory of interstate commerce as they sought to show it at the trial.

> "The Court: I think counsel can stipulate to that. I think all these witnesses have testified, these gentlemen who brought these records in here, that all they knew about any of this material was what was disclosed by the records and the records do not disclose what was done with the material, so why should we ask the question because if you are permitted to ask, you can ask it of every witness and get the same answer. Isn't it obvious the custodian of these records doesn't know what became of the material? I think it would be admitted that this witness does not know what became of any of this material after it left the establishment.
>
> Mr. Schullman: And we have, of course, asked for the exclusion of the documents and evidence, and of course they were admitted and I think this testimony—
>
> The Court (interceding): Why burden the record when this witness doesn't know anything about what was done with any of these materials? I think it is true, Mr. Howland, that, so far as the examination of all these witnesses who have come from these different wholesale houses, they have indicated that all they know is what is contained in the record." [Tr. 427-428.]

XVI.

The Trial Court Committed Reversible Error in Denying Appellants' Motion to Inspect Grand Jury Minutes.

During the trial, a number of references was made by counsel for Respondent to the effect that a grand jury investigation had been conducted into Appellants' activities prior to the indictment. Numerous references were made to testimony given and documents introduced during those proceedings. [Tr. pp. 490-492, 496-498, 502, 511, 524, 710-711.] For this reason counsel for Appellants moved to inspect the minutes of the Grand Jury proceedings. The motion was denied. [Tr. p. 30.]

An example of the prejudice suffered by Appellants because of the refusal to permit an inspection of the Grand Jury minutes is to be found in the quotation given below. It will be noted that the Trial Judge was willing to accept the accuracy of government counsel's characterization of what had taken place before the Grand Jury, which characterization was given in the presence of the jury, when in fact, as later statements indicated, the characterization was not an accurate one:

> "The Court: We had a statement yesterday—I do not know whether that is the situation in regard to this witness or not. Mr. Howland stated something of the scope of testimony before the Grand Jury. Is that the same situation?
>
> Mr. Howland: Yes, Your Honor.
>
> The Court: The individual merely appeared before the Grand Jury stated his position and identified the books and records.
>
> Mr. Howland: That is correct.

Mr. Schullman: We don't know. We were not there.

The Court: That is Mr. Howland's statement. So the objection is overruled. . . .

Mr. Howland: I now call upon the defendant, Merchant Plumbers Exchange, Inc. to produce certain original records which I might say, Your Honor, are at the present time under impounding order of the court having *first been introduced before the Grand Jury last March.*

Mr. Schullman: Your Honor, with the exception of the motion heretofore made in response to the request of the United Plumbing & Heating Company, without repeating this objection, we will make the same objections, subject to whatsoever ruling the court may make.

The Court: This is the same situation as to the scope of the testimony before the Grand Jury?

Mr. Howland: Yes, sir.

The Court: And the records and documents were presented by an officer of the corporation?

Mr. Howland: *In this particular case they were produced before the Grand Jury by Mr. A. R. Ruppert who was at that time Secretary-Treasurer of the Exchange.*

The Court: Objection overruled and the order will be that they be produced here.

Mr. Schullman: Your Honor, there is a serious question about this. I am advised that neither Mr. Ruppert nor Mr. Provenzeno did produce these at the Grand Jury. . . .

Mr. Howland: I would like to make this statement, if I may, for counsel's benefit. The request

for the incorporation minutes of the organizational meeting and the by-laws were all produced subsequent to the first meeting of the Grand Jury. At that time they could not be located. Subsequently it developed that they were in the law office of Mr. William Coulthard.

Mr. Schullman: Then it was not the testimony at the Grand Jury.

Mr. Howland: No. I said these documents were subject to the impounding order of this court. With the exception of the minutes and the by-laws, they were presented to the Grand Jury and produced by Mr. Ruppert." [Tr. pp. 492, 493, 496, 498.] (Emphasis supplied.)

The interchange quoted above demonstrates the wisdom of the large number of cases which hold that it is perfectly proper to require the government to produce grand jury minutes where there is no particular purpose to be served by secrecy. Particularly where it is the government itself which is making public what transpired in the grand jury proceedings, as was done in the instant case, the reason for secrecy vanishes.

> "The virtue of secrecy is not so imprisoning as to defeat justice nor does it lift itself for one side and then reassert its exclusiveness as against efforts of the other side to determine whether the use by one side is accurate. In other words, the government having disclosed a part may not now deny the defendant the right to determine whether that part so disclosed has been accurately disclosed, or whether its disclosure is partial and unfair."
>
> *United States v. Byoir,* 58 Fed. Supp. 273, 274 (N. D. Tex. 1945).

To the same effect, see:

United States v. Socony Vacuum Oil Co., 310 U. S. 150;

Metzler v. United States, 64 F. 2d 203 (C. C. A. 9, 1933);

Schmidt v. United States, 115 F. 2d 394 (C. C. A. 6, 1940);

United States v. Alper, 156 F. 2d 222 (C. C. A. 2. 1946).

XVII.

The Trial Court Committed Reversible Error in Denying Appellants' Motion for New Trial Upon Newly Discovered Evidence.

The trial before the District Court in the above matter was completely terminated, sentence imposed and Notice of Appeal effectuated on November 8, 1951.

On or about July 18, 1952, in behalf of Appellants in this matter, a Motion for New Trial Upon Newly Discovered Evidence was filed with the District Court and hearing thereon was set for October 7, 1952. On that day, his Honor Roger Foley, Judge of the United States District Court, for the District of Nevada, denied the Motion for New Trial Upon Newly Discovered Evidence and thereupon Appellants filed a Supplemental Designation of Record, so that all pleadings and proceedings in respect to such Motion for New Trial are part of this appeal.

In support of the Motion for New Trial, there was filed in the District Court the Affidavit of John W. Bonner, Counsel for Appellant, Ralph Alsup, together with the Affidavit of Richard Richards, one of Counsel for the remaining Appellants.

The Affidavit of John W. Bonner set forth the nature of the newly discovered evidence. This was clearly set forth in said Affidavit and the Exhibits A to J, inclusive, attached thereto. The exhibits were criminal complaints against certain officials of the Las Vegas Thoroughbred Racing Association, the date of filing ranging from November 21 to November 24, 1951; and in addition, there was set forth a copy of the petition of the bankruptcy proceedings filed by the stockholders of the Las Vegas Thoroughbred Racing Association on *March 25, 1952.*

The Affidavit of Richard Richards analyzed the testimony at the trial and set forth the basis for the granting of the new trial by the Court. In essence, said Affidavit and the Points and Authorities in Support of the Motion for New Trial filed concurrently with said Affidavit, established that thirteen witnesses during the trial had testified at considerable length concerning the race track, and that their testimony covered approximately two hundred thirty pages of testimony.

It was and is contended by Appellants that all of said testimony (compounded by additional arguments by Counsel at the trial in respect to the race track) raised strong and erroneous conclusions in the minds of the jury deciding the fate of the Appellants in this case.

The Affidavit of Richard Richards, in urging the granting of the new trial, exhibited the blocking by the Court or by Government Counsel of the attempts made by Counsel for Appellants to clarify the issues respecting the race track.

It was and is the contention of the Appellants that the injection at great length of this race track issue and the erroneous conclusions and inferences raised by

the Government that the inability to complete the plumbing jobs thereon, and the long shut-down of work on the race track, were due exclusively to the fault or on account of the Appellants, by reason of the alleged conspiracy, was highly prejudicial. It was urged and suggested by such testimony of the witnesses who discussed the race track, and Government Counsel's examination of them, that a strike was caused by the plumbers purportedly in pursuance of the alleged conspiracy and, as a result, work was shut down.

Examples, as set forth in said Affidavit of Richard Richards, concerning such testimony are as follows:

(a) Mr. Burns, a Government witness [commencing Tr. p. 875], was entirely concerned with the race track and the issues connected therewith. During cross-examination of Mr. Burns, the alleged strike of labor at the race track was discussed and the inference was presented to the jury that the strike was due to or in connection with alleged machinations of the Appellants then on trial.

Mr. Schullman asked [Tr. p. 898]: "Isn't it a fact that the race track ran into difficulties with money?" The answer given was negative in effect, and emphasis was again placed upon the strike and inferences again drawn adverse to Appellants.

(b) Mr. Schullman again attempted to bring out the fact of the then existing difficulties with the S. E. C. [Tr. p. 899.] This was objected to by Government Counsel and the Court sustained the objection, effectively blocking any testimony or information reaching the jury on this subject.

(c) Again, in respect to the testimony of Mr. Burns, Government Counsel on direct examination

went deeply into the problems and inferences involving the race track, and asked [Tr. p. 886]: "Did there come a time when the entire race track job was shut down by a strike?"

Thus, the Government was able to establish a clear inference, even though in error, as it appears upon the newly discovered evidence, that there was a connection between the alleged strike and the activity of Appellants.

It appears, therefore, that the Appellants have specific evidence which would be offered at a new trial. The difficulties confronting the construction and operation of the race track were difficulties caused by a lack of funds and by the machinations of certain individuals in no way connected with the Appellants herein. Such newly discovered evidence corroborates the position of the Appellants taken or attempted to be taken at the trial, and presents new and definite evidence on the overall subject, of which the jury should have the benefit in order to determine the essential issue of reasonable doubt concerning the alleged guilt of Appellants herein—it being the position of the Appellants that with such evidence before them, the jury would reach a decision of acquittal in this case.

(d) Again [Tr. p. 1001], in the course of the examination of Mr. Sylvester, a Government witness, Mr. Schullman made an offer of proof in which he pointed out the then current indefinite and vague status of the record in regard to the important matters being discussed and involving the race track issue and the status of the stockholders, and requested that the defendants be permitted to go into all

the facts relating to the race track. This offer of proof was rejected.

It is urged that the factual and legal essentials requisite to the granting of a new trial on newly discovered evidence were presented to the Trial Court on Appellants' Motion for New Trial, and the Trial Court should have granted the same.

It is clear that:

1. The evidence offered in the Motion for New Trial was actually newly discovered evidence and was unknown to Defendants at the time of the trial. This is clearly set forth in the Affidavit of John W. Bonner and the Exhibits A to J, inclusive, attached thereto, all of which occurred after the conclusion of the case in the District Court. The criminal complaints referred to in said Affidavit of John W. Bonner range from November 21, to 24, 1951, and the bankruptcy proceedings [Ex. J. of said Affidavit] was not filed *until March 25, 1952.*

Accordingly, the first requisite for the granting of such a Motion has been complied with.

Fogel v. United States, 167 F. 2d 763 (C. C. A. 5, 1948);

United States v. Johnson, 142 F. 2d 588 (C. C. A. 7, 1944);

Paddy v. United States, 143 F. 2d 847 (C. C. A. 9, 1944).

2. The evidence proffered, as set forth in the Affidavits of John W. Bonner and Richard Richards, was not merely cumulative or impeaching, but was material and basic, since the presentation of such testimony on a new trial would have caused the jury to arrive at the

only possible conclusion, and that is, that there was no conspiracy to violate the Sherman Antitrust Act. As the trial was actually conducted, however, the evidence, in bulk, proffered by the Government related to the race track, and without this newly discovered evidence the jury could conclude and did conclude that the alleged conspiracy must have existed and did prevent the completion of the plumbing jobs on the race track.

It is our contention that the newly discovered evidence is so material that it would *probably produce* a different verdict if a new trial were granted, because certainly the entire complexion and bases of the Government's case as a whole would be changed.

3. Such newly discovered evidence would probably produce an acquittal.

> *United States v. Colangelo,* 27 Fed. Supp. 921;
> *Arbuckle v. United States,* 146 F. 2d 657.

More importantly, such evidence would probably require the District Court on a Motion for Judgment of Acquittal to grant the same.

The rule of law, followed in this Circuit in respect to the elements required upon considering a Motion for Directed Verdict of Acquittal, is that enunciated in

> *Curley v. United States,* 160 F. 2d 229 (1947), cert den. 331 U. S. 837.

To the same effect, see:

> *United States v. Gardner,* 171 F. 2d 753 (C. C. A. 7, 1948);
>
> *United States v. Central Supply Assn.,* 6 F. R. D. 526 (D. C., N. D. Ohio, 1947);
>
> *United States v. Cole,* 90 Fed. Supp. 147 (1950).

These cases have adopted the rule as enunciated in the *Curley* case in which the Court stated:

> "The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. In a given case, particularly one of circumstantial evidence, that determination may depend upon the difference between pure speculation and legitimate inference from proven facts. The task of the judge in such case is not easy, for the rule of reason is frequently difficult to apply, but we know of no way to avoid that difficulty." (160 F. 2d at pp. 232-233.)

It is seriously submitted in this case that the newly discovered evidence if presented either to the jury or the judge, particularly since the case depends upon circumstantial evidence, would result in an acquittal.

4. The failure to learn of the evidence was due to no lack of diligence on the part of Defendants and Appellants.

This is apparent from what has been said before, since the criminal charges and the bankruptcy proceedings were subsequent to the conclusion of the trial.

Coates v. United States, 174 F. 2d 959.

Conclusion.

In view of the foregoing, Appellants respectfully urge that this record on appeal requires either of the following alternatives:

1. That this Court reverse the judgments of conviction, or

2. That this court reverse the judgments of conviction and reverse the order denying a new trial and remand the cause for such new trial in conformity with its judgment.

Respectfully submitted,

Alexander H. Schullman,
Richard Richards,
David Zenoff,
Attorneys for Appellants.

No. 13220

United States
Court of Appeals
For the Ninth Circuit.

CARMELO J. PELLEGRINO,

Appellant,

vs.

WILLIAM D. NESBIT, HUGH F. COLVIN, JAMES R. BRADBURN and CONSOLIDATED ENGINEERING CORPORATION,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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For Appellee Consolidated Engineering Corporation:

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411 West Fifth St.,
Los Angeles 13, Calif.

For Appellees William D. Nesbit, et al.:

WILLIS SARGENT and
SIDNEY H. WYSE,
510 S. Spring St.,
Los Angeles 13, Calif.

In the District Court of the United States in and for the Southern District of California, Central Division

No. 12582-HW Civil

CONSOLIDATED ENGINEERING CORPORATION, a California Corporation,

Plaintiff,

vs.

WILLIAM D. NESBIT,

Defendant.

COMPLAINT FOR RECOVERY OF PROFITS REALIZED BY DEALINGS IN THE STOCK OF PLAINTIFF CORPORATION

Plaintiff, Consolidated Engineering Corporation, doing business at 620 North Lake Avenue, Pasadena, California, brings this, its complaint, against the above-named defendant, who is a resident of the County of Los Angeles, and alleges as follows:

I.

This action arises under Section 16(b) of the Securities Exchange Act of 1934, U.S.C.A. Title 15, Section 78 p (b) as hereinafter more fully appears. Exclusive jurisdiction of actions arising under Section 16(b) of the Act is conferred upon the Federal Courts by Section 27 of that Act, U.S.C.A., Title 15, Section 78 aa. The amount in controversy exceeds Three Thousand Dollars ($3,000.00).

II.

The defendant, William D. Nesbit, was an officer of plaintiff, [2*] namely a Vice President, throughout the period during which the transactions hereinafter referred to took place.

III.

The stock of plaintiff consists of one class only, namely common stock. The common stock of the plaintiff is listed upon the Los Angeles Stock Exchange, a national securities exchange, and was so listed throughout the period during which the transactions hereinafter referred to took place.

IV.

Between March 1, 1949, and April 20, 1950, in transactions occurring within periods of less than six (6) months, the defendant made purchases and sales and sales and purchases of common stock issued by the plaintiff, as described specifically in Paragraph V. At the time of each of said purchases and sales and sales and purchases the defendant was the beneficial owner of the stock. From said transactions the defendant realized a profit.

V.

Between March 1, 1949, and April 20, 1950, the defendant made the following purchases and sales and sales and purchases of common stock issued by plaintiff:

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

Purchases			Sales		
Date	No. of Shares	Amount Paid	Date	No. of Shares	Amount Received
3/ 1/49	100	$ 500.00	3/ 1/49	100	$ 700.30
3/14/49	900	4,500.00	3/ 8/49	100	700.30
8/ 9/49*	1300	6,500.00	3/11/49	600	4,201.80
4/17/50**	100	500.00	8/ 9/49	200	2,740.96
			8/17/49	400	5,494.36
			8/18/49	400	5,531.68
			9/23/49	300	4,148.76
			9/26/49	100	1,382.92
			9/28/49	100	1,382.92
			4/20/50	100	2,054.51
	2400	$12,000.00		2400	$28,338.51

VI.

The defendant now holds, and at all times herein mentioned has held, an option agreement, effective April 18, 1946, with the plaintiff pursuant to the terms of which the defendant is, and has been entitled to purchase Five Thousand (5,000) shares of plaintiff's stock, original issue, at Five Dollars ($5.00) per share. The option is exercisable over a period of five (5) years, but the number of shares purchased in any one year under the option agreement is not to exceed one-fifth of the total number of shares subject to the option. The option terminates at death, is not transferable, and is conditioned upon continuation of employment. All purchases by the defendant hereinabove referred to in Paragraph IV and set forth in Paragraph V were

* Actually 2,000 shares were purchased 8-9-49 but there are only sales of 1,300 shares within six (6) months of that date against which the purchases can be matched.

** Actually 1,000 shares were purchased 4-17-50 but there are only sales of 100 shares within six months of that date against which purchases can be matched.

made at Five Dollars ($5.00) per share pursuant to this option agreement with the plaintiff.

VII.

From the purchases and sales and sales and purchases, as set out in Paragraph V, of Twenty-Four Hundred (2,400) shares of stock issued by the plaintiff, the defendant has realized a profit of Sixteen Thousand Three Hundred Thirty-Eight Dollars Fifty-One Cents ($16,338.51). This profit inures to and is recoverable by the plaintiff under the provisions of Section 16(b) of the Securities Exchange Act of 1934, U.S.C.A. Title 15, Section 78 p(b).

Wherefore, the plaintiff prays for judgment against the defendant as follows: [4]

1. For damages in the amount of Sixteen Thousand Three Hundred Thirty-Eight Dollars Fifty-One Cents ($16,338.51).

2. For its costs of suit herein.

3. For such other and further relief as may be proper in the premises.

LATHAM & WATKINS,

By /s/ AUSTIN H. PECK, JR.,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed November 21, 1950.

[Title of District Court and Cause.]

AMENDED ANSWER

Defendant, William D. Nesbit, in answer to the complaint of plaintiff, Consolidated Engineering Corporation, avers:

First Defense

I.

Answering Paragraph IV of the complaint, defendant admits that defendant made purchases and sales of stock of plaintiff during the period therein stated, in the manner and for the considerations hereinafter averred, and not otherwise. Defendant admits that at the time of each of said purchases and sales defendant was the beneficial owner of the stock, to the extent of one-half thereof, and no more, and in this respect defendant alleges that at all times mentioned in plaintiff's complaint, defendant and Esther Fe Nesbit were, and now are, husband and wife, residing in the State of California, and that the options held in the name of defendant, any and all shares of stock of plaintiff acquired in the name of defendant and all proceeds arising from the exercise of any such option or from the sale or other disposition of any such [7] shares were at all times, and now are, the community property of defendant and said Esther Fe Nesbit. Further answering said paragraph, defendant denies that defendant and his said wife realized any profit from these transactions.

II.

Answering Paragraph V of the complaint, defendant admits that defendant sold a total of 2,400 shares of plaintiff's stock, in the quantities, on the dates and for the price therein alleged.

Further answering Paragraph V, defendant denies that defendant made the purchases of shares therein alleged during the period therein stated, but admits that defendant made the following purchases of shares of plaintiff's stock, in the quantities, on the dates and for the cash consideration herein stated, as follows:

Date	No. of Shares	Amount Paid
March 4, 1949	100	$ 500
March 17, 1949	900	4,500
August 12, 1949	1000	5,000
September 28, 1949	1000	5,000

III.

Answering Paragraph VI of the complaint, defendant admits the allegations thereof except that defendant denies that said option was exercisable during any one year only as to one-fifth of the total number of shares subject thereto.

IV.

Answering Paragraph VII of the complaint, defendant denies that defendant and his said wife have realized any profit by reason of said purchases and sales.

Second Defense

The option agreement alleged in Paragraph VI of the complaint was one of a series of 16 such

agreements between plaintiff and a group of plaintiff's key employees, executed as an incentive plan to encourage said employees to remain in the employment of plaintiff at the salaries that plaintiff was then able to pay and to use their best efforts in the interest of plaintiff. [8] Defendant was induced to remain as an employee of plaintiff at the salary offered by plaintiff by reason of the execution of such option agreement. Defendant has been continuously employed by plaintiff since prior to the date of said agreement and to the date of this answer, and has remained in such employment in reliance on the benefits of said option agreement in affording defendant additional compensation. At the time such option agreement was entered into the reasonable market value of the shares of plaintiff was less than $5.

Third Defense

During the period alleged in plaintiff's complaint, defendant and his said wife, due to their financial circumstances, were unable to purchase shares under the option agreement, and thereby to secure additional compensation or an interest in plaintiff, without selling a portion of such shares substantially at the same time. In addition, defendant and his said wife were taxable at the time of the execution of any such option upon the difference between the option price and the market value of the shares so purchased on any such date. Defendant and his said wife were unable to purchase any shares under such option and to pay the tax thereon without, at

substantially the same time, selling a portion of said shares.

Fourth Defense

In the purchases and sales of the stock of plaintiff by defendant during the period alleged in the complaint, defendant did not make unfair use, or any use, of information obtained by defendant by reason of defendant's relationship to plaintiff as an officer or director.

Fifth Defense

The value of plaintiff's stock purchased by defendant gradually appreciated between the time of the execution of the option agreement and the dates of the purchases and sales by defendant. That the values of the stock on the date of such purchases, were as follows:

Date	No. of Shs.	Cost	Market Value
March 4, 1949	100	$ 500	$ 700.00
March 17, 1949	900	4,500	6,750.00
August 12, 1949	1000	5,000	13,750.00
September 28, 1949	1000	5,000	13,937.50

Sixth Defense

Defendant made such purchases and sales under arrangements made by, and with the approval of, plaintiff and in reliance upon plaintiff's assurance that plaintiff claimed no interest in any profits arising from said transactions or otherwise. That defendant would not have purchased or sold said stock and would not have been able to purchase said stock except in reliance upon such assurances and such arrangements. Plaintiff is thereby estopped

from asserting any interest in and to any profits realized from said transactions or other interest in any way connected with said transactions.

Wherefore defendant prays that plaintiff take nothing by its complaint and for judgment against plaintiff for defendant's costs incurred in this proceeding.

WILLIS SARGENT and
SIDNEY H. WYSE,

By /s/ SIDNEY H. WYSE,
Attorneys for Defendant.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed April 30, 1951. [10]

[Title of District Court and Cause.]

PRE-TRIAL STIPULATION

A. Stipulation of Facts

It Is Hereby Stipulated and Agreed by Consolidated Engineering Corporation, plaintiff in the above-entitled action, by and through Latham & Watkins, attorneys for plaintiff, and William D. Nesbit, defendant in said action, by and through Willis Sargent and Sidney H. Wyse, attorneys for defendant, that the facts hereafter stated in this stipulation shall be deemed true for all purposes of said action.

It Is Further Stipulated and Agreed that this

stipulation is entered into by and between the parties without prejudice to the right of either party to object to the materiality or relevancy of any fact herein stated under the issues raised by any of the pleadings in this action. [12]

I.

On August 21, 1946, plaintiff and defendant executed an agreement in writing, entitled "Option Agreement." A full, true and correct copy of said agreement is annexed to this stipulation as Exhibit A.

II.

Defendant entered into the following transactions involving the acquisition of shares of plaintiff:

(a) On or about March 4, 1949, defendant executed a notice stating that defendant elected to purchase 100 shares under the option agreement. On March 4, 1949, California Trust Company issued certificate No. 2108, for 100 shares, representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On March 4, 1949, defendant caused to be paid to California Trust Company the sum of $500, which sum was credited by California Trust Company to the account of plaintiff.

(b) On March 14, 1949, defendant executed a notice stating that defendant elected to purchase 900 shares under the option agreement. On March 17, 1949, California Trust Company issued certificates Nos. 2122 through 2130, each for 100 shares, representing the shares so purchased, and endorsed on

the option agreement a statement that the shares had been so issued. On March 17, 1949, defendant caused to be paid to California Trust Company the sum of $4,500, which sum was credited by California Trust Company to the account of plaintiff.

(c) On August 9, 1949, defendant executed a notice stating that defendant elected to purchase 1,000 shares under the option agreement. On August 12, 1949, California Trust Company issued certificates Nos. 2759 through 2768, each for 100 shares, representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On August 12, 1949, defendant caused to be paid to California Trust Company the sum of $5,000 which sum was credited by California Trust Company to the account of [13] plaintiff.

(d) On or about September 22, 1949, defendant executed a notice stating that defendant elected to purchase 1,000 shares under the option agreement. On September 28, 1949, California Trust Company issued certificates Nos. 2925 through 2934, each for 100 shares, representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On September 28, 1949, defendant caused to be paid to California Trust Company the sum of $5,000 which sum was credited by California Trust Company to the account of plaintiff.

(e) On April 7, 1950, defendant executed a notice stating that defendant elected to purchase 1,000 shares under the option agreement. On April 25, 1950, California Trust Company issued certifi-

cates Nos. 3665 through 3674, each for 100 shares, representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On April 12, 1950, defendant caused to be paid to California Trust Company the sum of $5,000, which sum was credited by California Trust Company to the account of plaintiff.

III.

Defendant entered into the following transactions involving sales of shares of plaintiff:

(a) On March 1, 1949, defendant sold 100 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $700.30, and delivered to the broker certificate No. 2108, for 100 shares, to effect the sale.

(b) On March 8, 1949, defendant sold 100 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $700.30, and delivered to the broker certificate No. 2122, for 100 shares, to effect the sale.

(c) On March 11, 1949, defendant sold 600 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for [14] $4,201.83, and delivered to the broker certificates 2123 through 2128, each for 100 shares, to effect the sale.

(d) On August 9, 1949, defendant sold 500 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $6,852.40, and delivered to the broker certificates Nos. 2759, 2760, 2762 through 2764, each for 100 shares, to effect the sale.

(e) On August 17, 1949, defendant sold 100 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $1,382.92, and delivered to the broker certificate No. 2765, for 100 shares, to effect the sale.

(f) On August 18, 1949, defendant sold 400 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $5,531.68, and delivered to the broker certificates Nos. 2761, 2766 through 2768, each for 100 shares, to effect the sale.

(g) On September 23, 1949, defendant sold 300 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $4,148.76, and delivered to the broker certificates Nos. 2927 through 2929, each for 100 shares, to effect the sale.

(h) On September 26, 1949, defendant sold 100 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $1,382.92, and delivered to the broker certificate No. 2925, for 100 shares, to effect the sale.

(i) On September 28, 1949, defendant sold 100 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $1,382.92, and delivered to the broker certificate No. 2926, for 100 shares, to effect the sale.

(j) On April 20, 1950, defendant sold 100 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $2,054.51, and delivered to the broker certificate No. 3300, for 100 shares, to effect the sale.

(k) On December 30, 1949, defendant surrendered certificates Nos. 2129, 2130 and 2930 through 2934, each for 100 shares, [15] to California Trust Company, which issued in exchange therefor certificates Nos. 3298, 3299 and 3300 through 3304, each for 100 shares, in the name of defendant and Esther Fe Nesbit, as joint tenants.

IV.

The range of prices at which shares of the plaintiff were bought and sold on the Los Angeles Stock Exchange, the bid and asked prices at which the shares were quoted on the Exchange on the days when no sales were effected, and the midpoint of such range or bid and asked prices were as follows, on the following listed dates:

Date		High	Low	Bid	Asked	Midpoint
8/21/46	Not Listed			4⅜	4⅞	4⅝
4/17/47	Not Listed			2¾	3¼	3
4/17/48	Not Listed			5⅛	5⅝	5⅜
3/ 4/49		7	7			7
3/14/49		7⅜	7⅜			7⅜
3/17/49		7½	7½			7½
4/16/49	(Saturday)*	No Sales		10¾	10⅞	10.81
4/18/49	(Monday)	11	10¾			10⅞
8/ 9/49		13⅞	13⅞			13⅞
8/12/49		13¾	13¾			13¾
9/22/49		13¾	13¾			13¾
9/28/49		14	14			14
4/ 7/50	Closed—Good Friday					
4/12/50		20⅜	20¼			20.31
4/17/50		20	20			20
4/25/50		21½	21¼			21⅜

* April 17, 1949, was Sunday.

V.

The dates on which the midpoint between the highest and lowest sales on the Los Angeles Stock Exchange was the lowest, during the following designated periods, and the high and low prices, and [16] the midpoints on such dates, were as follows:

Period	Date	High	Low	Midpoint
9/ 3/48 - 3/ 1/49	9/21/48	6⅝	6⅝	6⅝
9/10/48 - 3/ 8/49	9/21/48	6⅝	6⅝	6⅝
9/13/48 - 3/11/49	9/21/48	6⅝	6⅝	6⅝
2/11/49 - 8/ 9/49	2/11/49	7	7	7
2/19/49 - 8/17/49	3/ 1/49	7⅛	7	7.06
2/20/49 - 8/18/49	3/ 1/49	7⅛	7	7.06
3/ 1/49 - 8/30/49	3/ 1/49	7⅛	7	7.06
3/ 8/49 - 9/ 6/49	3/ 8/49	7⅛	7	7.06
3/11/49 - 9/ 9/49	3/11/49	7¼	7	7⅛
3/25/49 - 9/23/49	3/25/49	8	8	8
3/28/49 - 9/26/49	3/28/49	8½	8¼	8⅜
3/30/49 - 9/28/49	4/ 1/49	8½	8½	8½
8/ 9/49 - 2/ 7/50	9/12/49	13⅛	13⅛	13⅛
8/17/49 - 2/15/50	9/12/49	13⅛	13⅛	13⅛
8/18/49 - 2/16/50	9/12/49	13⅛	13⅛	13⅛
9/23/49 - 3/21/50	10/ 1/49	13½	13½	13½
9/26/49 - 3/24/50	10/ 1/49	13½	13½	13½
9/28/49 - 3/26/50	10/ 1/49	13½	13½	13½
10/22/49 - 4/20/50	10/24/49	16	16	16
4/20/50 - 10/18/50	7/18/50	19½	19⅛	19.31

VI.

At all times mentioned in this stipulation defendant and Esther Fe Nesbit were, and now are, husband and wife, and were, and now are residents of the State of California. Any reference in this stipulation to the acquisition or sale of the shares of plaintiff by defendant shall be without prejudice to any claim of defendant that the shares acquired

were acquired with, and were, community property of defendant and Esther Fe Nesbit, his wife, and that the proceeds of the sales of the shares were, and are, community property of defendant and Esther Fe Nesbit. [17]

VII.

The stock of the corporation was listed on the Los Angeles Stock Exchange, a national securities exchange, on April 23, 1948, and has been so listed at all times subsequent thereto. Prior to said date said stock was not listed on any national securities exchange.

VIII.

The Option Agreement between plaintiff and defendant was one of a series of sixteen such agreements between plaintiff and a group of plaintiff's key employees, executed as an incentive plan to encourage said employees to remain in the employ of plaintiff at the salary that plaintiff was then able to pay and to use their best efforts in the interest of plaintiff.

IX.

Defendant has been continuously employed by plaintiff since and prior to the time of said Option Agreement, and to the date of this stipulation.

X.

At the time said Option Agreement was entered into the fair market value of the shares of plaintiff was less than $5.00 per share.

XI.

There is attached hereto as Exhibit "B" a true and correct copy of the permit issued by the Division of Corporations of the State of California on July 23, 1946, authorizing plaintiff to enter into the option agreement with defendant and to sell shares pursuant thereto.

XII.

Between March 1, 1949, and April 20, 1950, plaintiff had a minimum of 174,190 shares of its common capital stock outstanding, of which, during the same period, defendant at no time owned more than 2,000 shares. [18]

XIII.

During the periods here involved Esther Fe Nesbit owned no shares of stock of plaintiff except whatever community property interest she may have possessed in the shares of stock standing in the name of defendant.

XIV.

At no time has Esther Fe Nesbit been either an officer or a director of plaintiff.

B. Statement of Facts Which Parties Are Unable to Concede

Plaintiff is unable to concede the following facts, but does not, as presently advised, intend to contest by evidence to the contrary:

(a) That the options held in the names of the defendants, any and all shares of stock of plaintiff acquired in the name of defendants, and all pro-

ceeds arising from the exercise of any such option or from the sale or disposition of any such shares were at all times, and now are, the community property of the defendants and their respective spouses;

(b) That defendants were induced to remain as employees of plaintiff by reason of the execution of the option agreement, or that they remained in such employment in reliance upon the benefits of said option agreements;

(c) That the defendants and their wives were unable to purchase shares under the option agreements, or to pay tax accruing upon such purchases, without selling a portion of such shares substantially at the same time.

C. Statement of Plaintiff's Objections to Admissibility of Stipulated Facts

Plaintiff reserves the following objections to the admissibility in evidence of the following facts:

(a) The facts set forth in Paragraph VIII herein, on the ground that said facts are irrelevant and immaterial, and, [19] under decided cases, have no bearing upon the determination of liability under Section 16(b) of the Securities Exchange Act of 1934 or on the amount of damages recoverable under said section.

(b) The facts set forth in Paragraph X herein, on the ground that said facts are irrelevant and immaterial, and, under decided cases, have no bearing upon the determination of liability under Section 16(b) of the Securities Exchange Act of 1934

or on the amount of damages recoverable under said section.

LATHAM & WATKINS,

By /s/ AUSTIN H. PECK, JR.,
Attorneys for Plaintiff.

WILLIS SARGENT AND
SIDNEY H. WYSE,

By /s/ SIDNEY H. WYSE,
Attorneys for Defendant.

Dated: May 25, 1951. [20]

EXHIBIT A

Option Agreement

This Option Agreement made and entered into this 21st day of August, 1946, but effective as of April 18, 1946, by and between Consolidated Engineering Corporation, a California corporation, hereinafter referred to as Consolidated, and William D. Nesbit, a resident of Pasadena, California, hereinafter called Nesbit.

Witnesseth

That Consolidated does hereby grant to Nesbit an option to purchase a total of not to exceed 5,000 shares of its common capital stock of the par value of $1.00 per share upon the following terms and conditions:

(1) The total number of shares, option to purchase which is hereby granted to Nesbit, is 5,000.

(2) The term of this agreement shall commence on April 18, 1946, and shall expire on July 15, 1951, unless prior to said time this agreement has otherwise terminated.

(3) The option to purchase hereby given shall be exercisable only in the following manner:

(a) For the first year of this agreement, Nesbit shall have an option to purchase up to but not to exceed 1,000 shares, which option shall be exercisable on or after April 17, 1947;

(b) For the second year of this agreement, up to but not to exceed an additional 1,000 shares, which option shall be exercisable on or after April 17, 1948;

(c) For the third year of this agreement, up to but not to exceed an additional 1,000 shares, which option shall be exercisable on or after April 17, 1949;

(d) For the fourth year of this agreement, up to but not to exceed an additional 1,000 shares, which option shall be exercisable on or after April 17, 1950; [21]

(e) For the fifth year of this agreement, up to but not to exceed an additional 1,000 shares, which option shall be exercisable on or after April 17, 1951.

(4) All of the options hereby given, and particularly described in paragraph (3) above shall, unless this agreement is sooner terminated, expire on July 15, 1951. The exercise by Nesbit of his option in part only as to shares for any year shall

not be deemed to limit in any way his right to exercise his option as to the balance of said shares so long as his option is in effect and this agreement has not been terminated.

(5) If he shall elect to exercise the options hereby given, either in whole or in part, and whether at one time or from time to time, Nesbit shall forthwith give written notice thereof to Consolidated. Such notice shall be in writing, addressed to Consolidated, for the attention of the Secretary, and sent by registered mail, postage prepaid. Said notice, to be effective shall specify the number of shares as to which the option is exercised, and the denomination and the name or names in which the certificate or certificates evidencing the shares shall be issued, and shall be accompanied by certified or cashier's check for the full amount of the purchase price of the shares to be issued. Upon receipt of such notice, and the purchase price of the shares to be issued, Consolidated will issue, or cause to be issued, certificates evidencing the shares so purchased.

(6) The price at which any of the shares subject to the options hereby granted are to be sold is $5.00 per share.

(7) This agreement shall automatically terminate prior to July 15, 1951, upon the happening of any of the following events:

(a) The exercise by Nesbit of all of the options hereby granted and the completion of

payment for and delivery of the shares as to which the options have been exercised.

(b) The death of Nesbit.

(c) Termination of Nesbit's employment with Consolidated, whether for cause or otherwise, and whether voluntary or involuntary inso far as either party is concerned. [22]

(d) Any attempt by Nesbit to assign all or any part of his rights hereunder.

(e) The mutual agreement of the parties hereto. Upon termination hereof, any options hereby granted and then unexercised shall forthwith terminate and be of no further force or effect.

(8) It is understood and agreed that this agreement shall not become effective for any purpose unless and until a proper permit has been obtained from the Commissioner of Corporations of the State of California (a) authorizing the granting by Consolidated of the options hereby given, and (b) authorizing the issuance of the stock of Consolidated pursuant to the exercise of said options.

If at any time the permit or permits so obtained shall be revoked, or shall expire for reasons not within the control of Consolidated, then in such event Consolidated shall be relieved of any further obligation to issue any of its shares hereunder.

(9) If at any time subsequent to the effective date hereof Consolidated shall declare a stock dividend on its outstanding common stock, or shall make effective a stock-split, it is agreed that Nes-

bit's option to purchase shall be adjusted to give effect thereto. By way of illustration of the foregoing, if Consolidated should hereafter declare a stock dividend of one common share on each common share outstanding, Nesbit's option thereafter shall be to purchase two shares for each share subject to option prior to the dividend, and the price for the two shares shall be $5.00, or $2.50 per share.

(10) This agreement shall not be assignable either in whole or in part by Nesbit.

(11) This agreement shall inure to the benefit of and be binding upon the successors and/or assigns of Consolidated.

(12) Time is of the essence hereof. [23]

In Witness Whereof, we have hereunto set our hands as of the day and year first above written.

CONSOLIDATED ENGINEERING CORPORATION,

By /s/ PHILIP S. FOGG,

By /s/ JAMES B. CHRISTIE,

/s/ WILLIAM D. NESBIT. [24]

EXHIBIT B

Before the Department of Investment Division of Corporations of the State of California

In the matter of the application of "CONSOLIDATED ENGINEERING CORPORATION" for a Permit Authorizing It to Sell and Issue Its Securities

File No. 6546LA
Receipt No. LA A31774

PERMIT

This Permit Does not Constitute a Recommendation or Endorsement of the Securities Permitted to Be Issued, but Is Permissive Only

"Consolidated Engineering Corporation,"

a California corporation, is hereby authorized to sell and issue its securities as hereinbelow set forth:

1. To sell and issue to James R. Bradburn, William D. Nesbit and Paul F. Hawley option agreements substantially in the form and tenor of the copy contained in the amendment to application filed with the Commissioner of Corporations July 19, 1946, and pursuant thereto to sell and issue to them an aggregate of not to exceed 15,000 of its shares, at and for the price of $5.00 per share, cash, lawful money of the United States, for the uses and purposes recited in its application as modified by the amendment thereto, and so as to net applicant the full amount of the selling price thereof.

This permit is issued upon the following condition:

(a) That unless revoked or suspended, or renewed upon [25] application filed on or before the date of expiration specified in this condition, all authority to sell securities under paragraph 1 of this permit shall terminate and expire on the 15th day of July, 1951.

Dated: Los Angeles, California, July 23, 1946.

EDWIN M. DAUGHERTY,
Commissioner of
Corporations.

By /s/ J. A. HAHN,
Assistant Commissioner.

[Endorsed]: Filed May 28, 1951. [26]

In the District Court of the United States in and for the Southern District of California, Central Division

No. 12583-HW Civil

CONSOLIDATED ENGINEERING CORPORATION, a California Corporation,

Plaintiff,

vs.

HUGH F. COLVIN,

Defendant.

COMPLAINT FOR RECOVERY OF PROFITS REALIZED BY DEALINGS IN THE STOCK OF PLAINTIFF CORPORATION

Plaintiff, Consolidated Engineering Corporation, doing business at 620 North Lake Avenue, Pasa-

dena, California, brings this, its complaint, against the above-named defendant, who is a resident of the County of Los Angeles, and alleges as follows:

I.

This action arises under Section 16(b) of the Securities Exchange Act of 1934, U.S.C.A. Title 15, Section 17 p (b) as hereinafter more fully appears. Exclusive jurisdiction of actions arising under Section 16 (b) of the Act is conferred upon the Federal Courts by Section 27 of that Act, U.S.C.A., Title 15, Section 78 aa. The amount in controversy exceeds Three Thousand Dollars ($3,000.00).

II.

The defendant, Hugh F. Colvin, was an officer of plaintiff, namely the Treasurer, throughout the period during which the [27] transactions hereinafter referred to took place.

III.

The stock of plaintiff consists of one class only, namely common stock. The common stock of the plaintiff is listed upon the Los Angeles Stock Exchange, a national securities exchange, and was so listed throughout the period during which the transactions hereinafter referred to took place.

IV.

Between March 25, 1949, and August 9, 1950, in transactions occurring within periods of less than six (6) months, the defendant made purchases and sales and sales and purchases of common stock

issued by the plaintiff, as described specifically in Paragraph V. At the time of each of said purchases and sales and sales and purchases the defendant was the beneficial owner of the stock. From said transactions the defendant realized a profit.

V.

Between March 25, 1949, and August 9, 1950, the defendant made the following purchases and sales and sales and purchases of common stock issued by plaintiff:

Purchases			Sales		
Date	No. of Shares	Amount Paid	Date	No. of Shares	Amount Received
3/31/49	300	$1,500.00	3/25/49	100	$ 786.93
4/ 7/49	300	1,500.00	3/31/49	200	1,672.86
5/20/49	100	500.00	4/11/49	300	2,769.16
7/22/49	100	500.00	9/29/49	100	1,382.92
8/ 9/50*	170	850.00	1/ 9/50	100	2,427.64
			8/ 7/50	170	3,651.60
Totals	970	$4,850.00		970	$12,691.11

VI.

The defendant now holds, and at all times herein mentioned [28] has held, an option agreement, effective August 1, 1947, with the plaintiff pursuant to the terms of which the defendant is, and has been, entitled to purchase Five Thousand (5,000) shares of plaintiff's stock, original issue, at Five Dollars ($5.00) per share. The option is exercisable over a period of five (5) years, but the number of shares purchased in any one year under the option agreement is not to exceed one-fifth of the total number

* (1,000 shares actually purchased 8-9-50 but only 170 can be matched against sales.)

of shares subject to the option. The option terminates at death, is not transferable, and is conditioned upon continuation of employment. All purchases by the defendant hereinabove referred to in Paragraph IV and set forth in Paragraph V were made at Five Dollars ($5.00) per share pursuant to this option agreement with the plaintiff.

VII.

From the purchases and sales and sales and purchases, as set out in Paragraph V, of Nine Hundred Seventy (970) shares of stock issued by the plaintiff, the defendant has realized a profit of Seven Thousand Eight Hundred Forty-one Dollars and Eleven Cents ($7,841.11). This profit inures to and is recoverable by the plaintiff under the provisions of Section 16(b) of the Securities Exchange Act of 1934, U.S.C.A. Title 15, Section 78 p(b).

Wherefore, the plaintiff prays for judgment against the defendant as follows:

1. For damages in the amount of Seven Thousand Eight Hundred Forty-one Dollars Eleven Cents ($7,841.11).

2. For its costs of suit herein.

3. For such other and further relief as may be proper in the premises.

LATHAM & WATKINS,

By /s/ AUSTIN H. PECK, JR.,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed November 21, 1950. [29]

[Title of District Court and Cause.]

No. 12583 C Civil

AMENDED ANSWER

Defendant, Hugh F. Colvin, in answer to the complaint of plaintiff, Consolidated Engineering Corporation, avers:

First Defense

I.

Answering Paragraph IV of the complaint, defendant admits that defendant made purchases and sales of stock of plaintiff during the period therein stated, in the manner and for the considerations hereinafter averred, and not otherwise. Defendant admits that at the time of each of said purchases and sales defendant was the beneficial owner of the stock, to the extent of one-half thereof, and no more, and in this respect defendant alleges that at all times mentioned in plaintiff's complaint, defendant and Audy Lou Colvin were, and now are, husband and wife, residing in the State of California, and that the options held in the name of defendant, any and all shares of stock of plaintiff acquired in the name of defendant and all proceeds arising from the exercise of any such option or from the sale or other disposition of any such shares were [31] at all times, and now are, the community property of defendant and said Audy Lou Colvin. Further answering said paragraph, defendant denies that defendant and his said wife realized any profit from these transactions.

II.

Answering Paragraph V of the complaint, defendant admits that defendant sold a total of 970 shares of plaintiff's stock, in the quantities, on the dates and for the price therein alleged.

Further answering Paragraph V, defendant denies that defendant made the purchases of shares therein alleged during the period therein stated, but admits that defendant made the following purchases of shares of plaintiff's stock, in the quantities, on the dates and for the cash consideration herein stated, as follows:

Date	No. of Shares	Amount Paid
April 8, 1949	300	$1,500
April 11, 1949	300	1,500
June 8, 1949	400	2,000
August 18, 1949	1000	5,000

III.

Answering Paragraph VI of the complaint, defendant admits the allegations thereof except that defendant denies that said option was exercisable during any one year only as to one-fifth of the total number of shares subject thereto.

IV.

Answering Paragraph VII of the complaint, defendant denies that defendant and his said wife have realized any profit by reason of said purchases and sales.

Second Defense

The option agreement alleged in Paragraph VI of the complaint was one of a series of 16 such

agreements between plaintiff and a group of plaintiff's key employees, executed as an incentive plan to encourage said employees to remain in the employment of plaintiff at the salaries that plaintiff was then able to pay and to use their best efforts in the interest of plaintiff. [32] Defendant was induced to remain as an employee of plaintiff at the salary offered by plaintiff by reason of the execution of such option agreement. Defendant has been continuously employed by plaintiff since prior to the date of said agreement and to the date of this answer, and has remained in such employment in reliance on the benefits of said option agreement in affording defendant additional compensation. At the time such option agreement was entered into the reasonable market value of the shares of plaintiff was less than $5.

Third Defense

During the period alleged in plaintiff's complaint, defendant and his said wife, due to their financial circumstances, were unable to purchase shares under the option agreement, and thereby to secure additional compensation or an interest in plaintiff, without selling a portion of such shares substantially at the same time. In addition, defendant and his said wife were taxable at the time of the execution of any such option upon the difference between the option price and the market value of the shares so purchased on any such date. Defendant and his said wife were unable to purchase any shares under such option and to pay the

tax thereon without, at substantially the same time, selling a portion of said shares.

Fourth Defense

In the purchases and sales of the stock of plaintiff by defendant during the period alleged in the complaint, defendant did not make unfair use, or any use, of information obtained by defendant by reason of defendant's relationship to plaintiff as an officer or director.

Fifth Defense

The value of plaintiff's stock purchased by defendant gradually appreciated between the time of the execution of the option agreement and the dates of the purchases and sales by defendant. That the values of the stock on the date of such purchases were as follows:

Date	No. of Shs.	Cost	Market Value
April 8, 1949	300	$1,500	$3,243.75
April 11, 1949	300	1,500	3,112.50
June 8, 1949	400	2,000	4,300.00
August 18, 1949	1000	5,000	19,625.00

Sixth Defense

Defendant made such purchases and sales under arrangements made by, and with the approval of, plaintiff and in reliance upon plaintiff's assurance that plaintiff claimed no interest in any profits arising from said transactions or otherwise. That defendant would not have purchased or sold said stock and would not have been able to purchase

said stock except in reliance upon such assurances and such arrangements. Plaintiff is thereby estopped from asserting any interest in and to any profits realized from said transactions or other interest in any way connected with said transactions.

Wherefore defendant prays that plaintiff take nothing by its complaint and for judgment against plaintiff for defendant's costs incurred in this proceeding.

WILLIS SARGENT and
SIDNEY H. WYSE,

By /s/ SIDNEY H. WYSE,
Attorneys for Defendant.

Duly verified.

[Endorsed]: Filed April 30, 1951. [34]

[Title of District Court and Cause.]

No. 12,583-HW—Civil

PRE-TRIAL STIPULATION

A. Stipulation of Facts

It Is Hereby Stipulated and Agreed by Consolidated Engineering Corporation, plaintiff in the above-entitled action, by and through Latham & Watkins, attorneys for plaintiff, and Hugh F. Colvin, defendant in said action, by and through Willis Sargent and Sidney H. Wyse, attorneys for defendant, that the facts hereafter stated in this stipulation shall be deemed true for all purposes of said action.

It Is Further Stipulated and Agreed that this stipulation is entered into by and between the parties without prejudice to the right of either party to object to the materiality or relevancy of any fact herein stated under the issues raised by any of the pleadings in this action. [36]

I.

On August 21, 1946, plaintiff and defendant executed an agreement in writing, entitled "Option Agreement." A full, true and correct copy of said agreement is annexed to this stipulation as Exhibit A.

II.

Defendant entered into the following transactions involving the acquisition of shares:

(a) On March 31, 1949, defendant executed a notice stating that defendant elected to purchase 300 shares under the option agreement. On April 8, 1949, California Trust Company issued certificates Nos. 2215 through 2217, each for 100 shares, representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On April 8, 1949, defendant caused to be paid to California Trust Company the sum of $5,000, which sum was credited by California Trust Company to the account of plaintiff.

(b) On April 7, 1949, defendant executed a notice stating that defendant elected to purchase 300 shares under the option agreement. On April 11, 1949, California Trust Company issued certificates Nos. 2225 through 2227, each for 100 shares,

representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On April 11, 1949, defendant caused to be paid to California Trust Company the sum of $1,500, which sum was credited by California Trust Company to the account of plaintiff.

(c) On May 20, 1949, defendant executed a notice of his election to purchase 400 shares under the option agreement. On June 8, 1949, California Trust Company issued certificates Nos. 2611 through 2614, each for 100 shares, representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On May 20, 1949, defendant caused to be [37] paid to California Trust Company the sum of $2,000, which sum was credited by California Trust Company to the account of plaintiff.

(d) On July 22, 1949, defendant executed a notice stating that defendant elected to purchase, as of August 1, 1949, the accrual date under the option agreement, 1,000 shares under the option agreement. On August 18, 1949, California Trust Company issued certificates Nos. 2778 through 2787, each for 100 shares, representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On August 18, 1949, defendant caused to be paid to California Trust Company the sum of $5,000, which sum was credited by California Trust Company to the account of plaintiff.

(e) On August 9, 1950, defendant executed a notice stating that defendant elected to purchase

1,000 shares under the option agreement. On September 1, 1950, California Trust Company issued certificates Nos. 4068 through 4077, each for 100 shares, representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On September 1, 1950, defendant caused to be paid to California Trust Company the sum of $5,000, which sum was credited by California Trust Company to the account of plaintiff.

III.

Defendant entered into the following transactions involving sales of shares of plaintiff:

(a) On March 25, 1949, defendant sold 100 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $786.93, and delivered to the broker certificate No. 2215, for 100 shares, to effect the sale.

(b) On March 28, 1949, defendant sold 200 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $1,672.86, and delivered to the broker certificates Nos. 2216 and 2217, each for 100 shares, to effect the sale. [38]

(c) On April 6, 1949, defendant sold 300 shares through Hopkins, Harbach & Co., a member of the Los Angeles Stock Exchange, for $2,769.16, and delivered to the broker certificates Nos. 2225 through 2227, each for 100 shares, to effect the sale.

(d) On September 29, 1949, defendant sold 100 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $1,382.92,

and delivered to the broker certificate No. 2778, for 100 shares, to effect the sale.

(e) On January 9, 1950, defendant sold 100 shares for $2,427.64, and delivered to the broker certificate No. 2611, for 100 shares, to effect the sale.

(f) On August 7, 1950, defendant sold 170 shares through Merrill, Lynch, Pierce, Fenner and Beane, a member of the Los Angeles Stock Exchange, for $3,651.50, and delivered to the broker certificates Nos. 2782 and 2783, to effect the sale.

IV.

The range of prices at which shares of the plaintiff were bought and sold on the Los Angeles Stock Exchange, the bid and asked prices at which the shares were quoted on the Exchange on the days when no sales were effected, and the midpoint of such range or bid and asked prices were as follows, on the following listed dates:

Date	High	Low	Bid	Asked	Midpoint
8/14/47	Not Listed		3½	4	3¾
7/30/48*	6¾	6¾			6¾
8/ 2/48**	No Sales		6⅝	6⅞	6¾
3/31/49	No Sales		8⅜	8¾	8.56
4/ 7/49	10⅞	10½			10.68
4/ 8/49	10⅞	10¾			10.81
4/11/49	10½	10¼			10⅜
5/20/49	13¾	13¾			13¾
6/ 8/49	10¾	10½			10⅜
8/ 1/49	13⅞	13¾			13.81
8/18/49	14	14			14
8/ 1/50	21⅞	21½			21.69
8/19/50	Closed (Saturday)				
9/ 1/50	No Sales		19½	19⅝	19.56

* July 31, 1948—no sales.

** August 1, 1948, was Sunday.

V.

The dates on which the midpoint between the highest and lowest sales on the Los Angeles Stock Exchange was the lowest, during the following designated periods, and the high and low prices, and the midpoints on such dates, were as follows:

Period	Date	High	Low	Midpoint
9/27/48 - 3/25/49	1/ 5/49	6¾	6⅝	6.69
9/30/48 - 3/28/49	1/ 5/49	6¾	6⅝	6.69
10/ 8/48 - 4/ 6/49	1/ 5/49	6¾	6⅝	6.69
3/25/49 - 9/23/49	3/25/49	8	8	8
3/28/49 - 9/26/49	3/28/49	8½	8¼	8⅜
3/31/49 - 9/29/49	4/ 1/49	8½	8½	8½
4/ 6/49 - 10/ 4/49	4/ 6/49	10⅞	9¼	9.41
7/11/49 - 1/ 9/50	7/12/49	12	12	12
9/29/49 - 3/27/50	10/ 1/49	13½	13½	13½
1/ 9/50 - 7/ 7/50	3/27/50	19¼	19¼	19¼
2/ 9/50 - 9/ 7/50	7/18/50	19½	19⅛	19.31
8/ 7/50 - 2/ 5/51	12/ 4/50	19	19	19

VI.

At all times mentioned in this stipulation defendant and Audy Lou Colvin were, and now are, husband and wife, and were, and now are, residents of the State of California. Any reference in this stipulation to the acquisition or sale of the shares of plaintiff by defendant shall be without prejudice to any claim of defendant that [40] the shares acquired were acquired with, and were, community property of defendant and Audy Lou Colvin, his wife, and that the proceeds of the sales of the shares were, and are, community property of defendant and Audy Lou Colvin.

VII.

The stock of the corporation was listed on the Los Angeles Stock Exchange, a national securities exchange, on April 23, 1948, and has been so listed at all times subsequent thereto. Prior to said date said stock was not listed on any national securities exchange.

VIII.

The Option Agreement between plaintiff and defendant was one of a series of sixteen such agreements between plaintiff and a group of plaintiff's key employees, executed as an incentive plan to encourage said employees to remain in the employ of plaintiff at the salary that plaintiff was then able to pay and to use their best efforts in the interest of plaintiff.

IX.

Defendant has been continuously employed by plaintiff since and prior to the time of said Option Agreement, and to the date of this stipulation.

X.

At the time said Option Agreement was entered into the fair market value of the shares of plaintiff was less than $5.00 per share.

XI.

There is attached hereto as Exhibit "B" a true and correct copy of the permit issued by the Division of Corporations of the State of California on July 23, 1946, authorizing plaintiff to enter into the option agreement with defendant and to sell shares pursuant thereto. [41]

XII.

Between March 25, 1949, and August 9, 1950, plaintiff had a minimum of 176,790 shares of its common capital stock outstanding, of which, during the same period, defendant at no time owned more than 1,420 shares.

XIII.

During the periods here involved Audy Lou Colvin owned no shares of stock of plaintiff except whatever community property interest she may have possessed in the shares of stock standing in the name of defendant.

XIV.

At no time has Audy Lou Colvin been either an officer or a director of plaintiff.

B. Statement of Facts Which Parties Are Unable to Concede

Plaintiff is unable to concede the following facts, but does not, as presently advised, intend to contest by evidence to the contrary:

(a) That the options held in the names of the defendants, any and all shares of stock of plaintiff acquired in the name of defendant, and all proceeds arising from the exercise of any such option or from the sale or disposition of any such shares were at all times, and now are, the community property of the defendants and their respective spouses;

(b) That defendants were induced to remain as employees of plaintiff by reason of the execution of the option agreements, or that they remained in

such employment in reliance upon the benefits of said option agreements;

(c) That the defendants and their wives were unable to purchase shares under the option agreements, or to pay tax accruing upon such purchases, without selling a portion of such shares substantially at the same time. [42]

C. Statement of Plaintiff's Objections to Admissibility of Stipulated Facts

Plaintiff reserves the following objections to the admissibility in evidence of the following facts:

(a) The facts set forth in Paragraph VIII herein, on the ground that said facts are irrelevant and immaterial, and, under decided cases, have no bearing upon the determination of liability under Section 16(b) of the Securities Exchange Act of 1934 or on the amount of damages recoverable under said section.

(b) The facts set forth in Paragraph X herein, on the ground that said facts are irrelevant and immaterial, and, under decided cases, have no bearing upon the determination of liability under Section 16(b) of the Securities Exchange Act of 1934 or on the amount of damages recoverable under said section.

LATHAM & WATKINS,

By /s/ AUSTIN H. PECK, JR.,
Attorneys for Plaintiff.

WILLIS SARGENT and
SIDNEY H. WYSE,

By /s/ SIDNEY H. WYSE,
Attorneys for Defendant.

Dated May 25, 1951. [43]

EXHIBIT A

Option Agreement

This Option Agreement made and entered into this 14th day of August, 1947, but effective as of August 1, 1947, by and between Consolidated Engineering Corporation, a California corporation, hereinafter referred to as Consolidated, and Hugh Colvin, a resident of Pasadena, California, hereinafter called Colvin.

Witnesseth

That Consolidated does hereby grant to Colvin an option to purchase a total of not to exceed 5,000 shares of its common capital stock of the par value of $1.00 per share upon the following terms and conditions:

(1) The total number of shares, option to purchase which is hereby granted to Colvin, is 5,000.

(2) The term of this agreement shall commence on August 1, 1947, and shall expire on August 31, 1952, unless prior to said time this agreement has otherwise terminated.

(3) The option to purchase hereby given shall be exercisable only in the following manner:

(1) For the first year of this agreement, Colvin shall have an option to purchase up to but not to exceed 1,000 shares, which option shall be exercisable on or after August 1, 1948;

(b) For the second year of this agreement, up to but not to exceed an additional 1,000 shares, which option shall be exercisable on or after August 1, 1949;

(c) For the third year of this agreement, up to but not to exceed an additional 1,000 shares, which option shall be exercisable on or after August 1, 1950; [44]

(d) For the fourth year of this agreement, up to but not to exceed an additional 1,000 shares, which option shall be exercisable on or after August 1, 1951;

(e) For the fifth year of this agreement, up to but not to exceed an additional 1,000 shares, which option shall be exercisable on or after August 1, 1952.

(4) All of the options hereby given, and particularly described in paragraph (3) above shall, unless this agreement is sooner terminated, expire on August 31, 1952. The exercise by Colvin of his option in part only as to shares for any year shall not be deemed to limit in any way his right to exercise his option as to the balance of said shares so long as his option is in effect and this agreement has not been terminated.

(5) If he shall elect to exercise the options hereby given, either in whole or in part, and whether

at one time or from time to time, Colvin shall forthwith give written notice thereof to Consolidated. Such notice shall be in writing, addressed to Consolidated, for the attention of the Secretary, and sent by registered mail, postage prepaid. Said notice, to be effective shall specify the number of shares as to which the option is exercised, and the denomination and the name or names in which the certificate or certificates evidencing the shares shall be issued, and shall be accompanied by certified or cashier's check for the full amount of the purchase price of the shares to be issued. Upon receipt of such notice, and the purchase price of the shares to be issued, Consolidated will issue, or cause to be issued, certificates evidencing the shares so purchased.

(6) The price at which any of the shares subject to the options hereby granted are to be sold is $5.00 per share.

(7) This agreement shall automatically terminate prior to August 31, 1952, upon the happening of any of the following events:

(a) The exercise by Colvin of all of the options hereby granted and the completion of payment for and delivery of the shares as to which the options have been exercised. [45]

(b) The death of Colvin.

(c) Termination of Colvin's employment with Consolidated, whether for cause or otherwise, and whether voluntary or involuntary insofar as either party is concerned.

(d) Any attempt by Colvin to assign all or any part of his rights hereunder.

(e) The mutual agreement of the parties hereto. Upon termination hereof, any options hereby granted and then unexercised shall forthwith terminate and be of no further force or effect.

(8) It is understood and agreed that this agreement shall not become effective for any purpose unless and until a proper permit has been obtained from the Commissioner of Corporations of the State of California (a) authorizing the granting by Consolidated of the options hereby given, and (b) authorizing the issuance of the stock of Consolidated pursuant to the exercise of said options.

If at any time the permit or permits so obtained shall be revoked, or shall expire for reasons not within the control of Consolidated, then in such event Consolidated shall be relieved of any further obligation to issue any of its shares hereunder.

(9) If at any time subsequent to the effective date hereof Consolidated shall declare a stock dividend on its outstanding common stock, or shall make effective a stock-split, it is agreed that Colvin's option to purchase shall be adjusted to give effect thereto. By way of illustration of the foregoing, if Consolidated should hereafter declare a stock dividend of one common share on each common share outstanding, Colvin's option thereafter shall be to purchase two shares for each share subject to option

prior to the dividend, and the price for the two shares shall be $5.00, or $2.50 per share.

(10) This agreement shall not be assignable either in whole or in part by Colvin.

(11) This agreement shall inure to the benefit of and be binding upon the successors and/or assigns of Consolidated. [46]

(12) Time is of the essence hereof.

In Witness Whereof, we have hereunto set our hands as of the day and year first above written.

CONSOLIDATED ENGINEERING CORPORATION.

By /s/ PHILIP S. FOGG,

By /s/ JAMES B. CHRISTIE,

/s/ HUGH F. COLVIN. [47]

EXHIBIT B

Before the Department of Investment, Division of Corporations of the State of California

In the matter of the application of "CONSOLIDATED ENGINEERING CORPORATION" for a permit authorizing it to sell and issue its securities

PERMIT

File No. 65446LA
Receipt No. LA A44173

This Permit Does Not Constitute a Recommendation Or Endorsement of the Securities Permitted to Be Issued, But Is Permissive Only

"Consolidated Engineering Corporation"

a California corporation, is hereby authorized to sell and issue its securities as hereinbelow set forth:

1. To sell and issue to Hugh Colvin an option agreement substantially in the form and tenor of the copy contained in the application filed with the Commissioner of Corporations August 6, 1947, and pursuant thereto to sell and issue to him an aggregate of not to exceed 5,000 of its shares, at and for the price of $5.00 per share, cash, lawful money of the United States, for the uses and purposes recited in said application, and so as to net applicant the full amount of the selling price thereof. This permit is issued upon the following condition:

(a) That unless revoked or suspended, or renewed upon application filed on or before the

date of expiration specified in this condition, all authority to sell securities under paragraph 1 of this permit shall terminate and [48] expire on the 31st day of August, 1952.

Dated Los Angeles, California, August 12, 1947.

EDWIN M. DAUGHERTY,
Commissioner of
Corporations.

By /s/ J. A. HAHN,
Assistant Commissioner.

[Endorsed]: Filed May 28, 1951. [49]

In the District Court of the United States in and for the Southern District of California, Central Division

No. 12,584-HW—Civil

CONSOLIDATED ENGINEERING CORPORATION, a California Corporation,

Plaintiff,

vs.

JAMES R. BRADBURN,

Defendant.

COMPLAINT FOR RECOVERY OF PROFITS REALIZED BY DEALINGS IN THE STOCK OF PLAINTIFF CORPORATION

Plaintiff, Consolidated Engineering Corporation, doing business at 620 North Lake Avenue, Pasadena, California, brings this, its complaint, against the

above-named defendant, who is a resident of the County of Los Angeles, and alleges as follows:

I.

This action arises under Section 16(b) of the Securities Exchange Act of 1934, U.S.C.A. Title 15, Section 78p (b) as hereinafter more fully appears. Exclusive jurisdiction of actions arising under Section 16(b) of the Act is conferred upon the Federal Courts by Section 27 of the Act, U.S.C.A., Title 15, Section 78 aa. The amount in controversy exceeds Three Thousand Dollars ($3,000.00).

II.

The defendant, James R. Bradburn, was an officer of plaintiff, namely a Vice-President, throughout the period during which the [50] transactions hereinafter referred to took place.

III.

The stock of plaintiff consists of one class only, namely common stock. The common stock of the plaintiff is listed upon the Los Angeles Stock Exchange, a national securities exchange, and was so listed throughout the period during which the transactions hereinafter referred to took place.

IV.

Between March 24, 1949, and April 25, 1950, in transactions occurring within periods of less than six (6) months, the defendant made purchases and sales and sales and purchases of stock issued by the plaintiff, as specifically described in Paragraph V. At the time of each of said purchases and sales and sales and purchases the defendant was the bene-

ficial owner of the stock. From these transactions the defendant realized a profit.

V.

Between March 24, 1949, and April 25, 1950, the defendant made the following purchases and sales and sales and purchases of common stock issued by plaintiff:

Purchases			Sales		
Date	No. of Shares	Amount Paid	Date	No. of Shares	Amount Received
3/28/49	1000	$5,000.00	3/24/49	200	$1,573.86
4/ 2/49	1000	5,000.00	3/28/49	200	1,648.10
9/ 1/49	260	1,300.00	3/29/49	500	4,064.34
9/23/49	200	1,000.00	4/ 2/49	1000	8,983.10
4/ 7/50*	100	500.00	8/ 8/49	100	1,370.48
			9/30/49	200	2,765.84
* (1,000 shares actually purchased 4-7-50 but only 100 can be matched against sales.)			10/ 4/49	60	827.82
			12/13/49	100	2,527.13
			2/21/50	100	2,178.89
			4/25/50	100	2,104.26
Totals	2560	$12,800.00		2560	$28,043.82

VI.

The defendant now holds, and at all times herein mentioned has held, an option agreement, effective April 18, 1946, with the plaintiff pursuant to the terms of which the defendant is, and has been, entitled to purchase Five Thousand (5,000) shares of plaintiff's stock, original issue, at Five Dollars ($5.00) per share. The option is exercisable over a period of five (5) years, but the number of shares purchased in any one year under the option agreement is not to exceed one-fifth of the total number

of shares subject to the option. The option terminates at death, is not transferable, and is conditioned upon continuation of employment. All purchases by the defendant hereinabove referred to in Paragraph IV and set forth in Paragraph V were made at Five Dollars ($5.00) per share pursuant to this option agreement with the plaintiff.

VII.

From the purchases and sales and sales and purchases, as set out in Paragraph V, of Two Thousand Five Hundred Sixty (2,560) shares of stock issued by the plaintiff, the defendant has realized a profit of Fifteen Thousand Two Hundred Forty-Three Dollars Eighty-Two Cents ($15,243.82). This profit inures to and is recoverable by the plaintiff under the provisions of Section 16 (b) of the Securities Exchange Act of 1934, U.S.C.A. Title 15, Section 78 p(b).

Wherefore, the plaintiff prays for judgment against the defendant as follows:

1. For damages in the amount of Fifteen Thousand Two Hundred Forty-Three Dollars Eighty-Two Cents ($15,243.82).

2. For its costs of suit herein.

3. For such other and further relief as may be proper in the premises.

LATHAM & WATKINS

By /s/ AUSTIN H. PECK JR.,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed November 21, 1950 [52]

[Title of District Court and Cause.]

No. 12,584-BH—Civil

AMENDED ANSWER

Defendant, James R. Bradburn, in answer to the complaint of plaintiff, Consolidated Engineering Corporation, avers:

First Defense

I.

Answering Paragraph IV of the complaint, defendant admits that defendant made purchases and sales of stock of plaintiff during the period therein stated, in the manner and for the considerations hereinafter averred, and not otherwise. Defendant admits that at the time of each of said purchases and sales defendant was the beneficial owner of the stock, to the extent of one-half thereof, and no more, and in this respect defendant alleges that at all times mentioned in plaintiff's complaint, defendant and King Turnbull Bradburn were, and now are, husband and wife, residing in the State of California, and that the options held in the name of defendant, any and all shares of stock of plaintiff acquired in the name of defendant and all proceeds arising from the exercise of any such option or from the sale or other disposition of any [54] such shares were at all times, and now are, the community property of defendant and said King Turnbull Bradburn. Further answering said paragraph, defendant denies that defendant and his said wife realized any profit from these transactions.

II.

Answering Paragraph V of the complaint, defendant admits that defendant sold a total of 2560 shares of plaintiff's stock, in the quantities, on the dates and for the price therein alleged.

Further answering Paragraph V, defendant denies that defendant made the purchases of shares therein alleged during the period therein stated, but admits that defendant made the following purchases of shares of plaintiff's stock, in the quantities, on the dates and for the cash consideration herein stated, as follows:

Date	No. of Shares	Amount Paid
April 6, 1949	1000	$5,000
April 13, 1949	1000	5,000
September 3, 1949	260	.....
March 6, 1950	1000	5,000

With respect to the purchase of 260 shares of plaintiff's stock on September 3, 1949, defendant acquired said stock by the conversion of $1300 face amount of plaintiff's Series A, 6% Convertible Debentures, dated October 1, 1947, purchased by defendant on November 8, 1947, at a cost of $1300.

III.

Answering Paragraph VI of the complaint, defendant admits the allegations thereof except that defendant denies that said option was exercisable during any one year only as to one-fifth of the total number of shares subject thereto.

IV.

Answering Paragraph VII of the complaint, defendant denies that defendant and his said wife have realized any profit by reason of said purchases and sales.

Second Defense

The option agreement alleged in Paragraph VI of the complaint was one [55] of a series of 16 such agreements between plaintiff and a group of plaintiff's key employees, executed as an incentive plan to encourage said employees to remain in the employment of plaintiff at the salaries that plaintiff was then able to pay and to use their best efforts in the interest of plaintiff. Defendant was induced to remain as an employee of plaintiff at the salary offered by plaintiff by reason of the execution of such option agreement. Defendant has been continuously employed by plaintiff since prior to the date of said agreement and to the date of this answer, and has remained in such employment in reliance on the benefits of said option agreement in affording defendant additional compensation. At the time such option agreement was entered into the reasonable market value of the shares of plaintiff was less than $5.

Third Defense

During the period alleged in plaintiff's complaint, defendant and his said wife, due to their financial circumstances, were unable to purchase shares under the option agreement, and thereby to secure additional compensation or an interest

in plaintiff, without selling a portion of such shares substantially at the same time. In addition, defendant and his said wife were taxable at the time of the execution of any such option upon the difference between the option price and the market value of the shares so purchased on any such date. Defendant and his said wife were unable to purchase any shares under such option and to pay the tax thereon without, at substantially the same time, selling a portion of said shares.

Fourth Defense

In the purchases and sales of the stock of plaintiff by defendant during the period alleged in the complaint, defendant did not make unfair use, or any use, of information obtained by defendant by reason of defendant's relationship to plaintiff as an officer or director.

Fifth Defense

The value of plaintiff's stock purchased by defendant gradually appreciated between the time of the execution of the option agreement and the dates of the purchases and sales by defendant. That the values of the stock [56] on the date of such purchases, were as follows:

Date	No. of Shs.	Cost	Market Value
April 6, 1949	1000	$5,000	$10,062.50
April 13, 1949	1000	5,000	10,375.00
September 3, 1949	260	1,300	3,526.25
March 6, 1950	1000	5,000	21,250.00

Sixth Defense

Defendant made such purchases and sales under arrangements made by, and with the approval of, plaintiff and in reliance upon plaintiff's assurance that plaintiff claimed no interest in any profits arising from said transactions or otherwise. That defendant would not have purchased or sold said stock and would not have been able to purchase said stock except in reliance upon such assurances and such arrangements. Plaintiff is thereby estopped from asserting any interest in and to any profits realized from said transactions or other interest in any way connected with said transactions.

Wherefore defendant prays that plaintiff take nothing by its complaint and for judgment against plaintiff for defendant's costs incurred in this proceeding.

WILLIS SARGENT and
SIDNEY H. WYSE,

By /s/ SIDNEY H. WYSE,
Attorneys for Defendant.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 30, 1951. [57]

[Title of District Court and Cause.]

No. 12,584-HW—Civil

PRE-TRIAL STIPULATION

A. Stipulation of Facts

It Is Hereby Stipulated and Agreed by Consolidated Engineering Corporation, plaintiff in the above-entitled action, by and through Latham & Watkins, attorneys for plaintiff, and James R. Bradburn, defendant in said action, by and through Willis Sargent and Sidney H. Wyse, attorneys for defendant, that the facts hereafter stated in this stipulation shall be deemed true for all purposes of said action.

It Is Further Stipulated and Agreed that this stipulation is entered into by and between the parties without prejudice to the right of either party to object to the materiality or relevancy of any fact herein stated under the issues raised by any of the pleadings in this action.

I.

On August 21, 1946, plaintiff and defendant executed an [59] agreement in writing, entitled "Option Agreement." A full, true and correct copy of said agreement is annexed to this stipulation as Exhibit "A."

II.

Defendant entered into the following transactions involving the acquisition of shares of plaintiff:

(a) On June 30, 1947, defendant purchased 200

shares for $550. Defendant received certificates Nos. 1343 and 1344, each for 100 shares, representing the shares so purchased.

(b) On August 30, 1949, defendant delivered to California Trust Company, transfer agent of plaintiff, Series A, 6% convertible debentures, dated October 1, 1947, in the face value of $1,300, with instructions to cancel the debentures and to issue 260 shares therefor. The debentures had been purchased by defendant on November 8, 1947, at a cost of $1,300. On September 3, 1949, California Trust Company delivered to defendant the following certificates, representing the shares so acquired in exchange for the debentures: No. 2878 for 100 shares, No. 2879 for 100 shares, No. L936 for 50 shares and No. L937 for 10 shares.

(c) On November 21, 1947, defendant purchased 100 shares for $434.80. Defendant received certificate No. 1465, representing the shares so purchased.

(d) On March 28, 1949, defendant executed a notice stating that defendant elected to purchase 1,000 shares under the option agreement. On April 6, 1949, California Trust Company issued certificates Nos. 2203 through 2212, each for 100 shares, representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On April 6, 1949, defendant caused to be paid to California Trust Company the sum of $5,000, which sum was credited by California Trust Company to the account of plaintiff.

(e) On April 2, 1949, defendant executed a no-

tice of his election to purchase 1,000 shares under the option agreement. On [60] April 11, 1949, California Trust Company issued certificates Nos. 2228 through 2237, each for 100 shares, representing the shares so purchased, and endorsed on the option agreement that the shares had been so issued. On April 11, 1949, defendant caused to be paid to California Trust Company the sum of $5,000, which sum was credited by California Trust Company to the account of plaintiff.

(f) On September 23, 1949, defendant executed a notice of his election to purchase 500 shares under the option agreement. On January 5, 1950, he executed a notice of his election to purchase an additional 500 shares under the option agreement. On March 6, 1950, California Trust Company issued certificates Nos. 3502 through 3511, each for 100 shares, representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On March 20, 1950, defendant caused to be paid to California Trust Company the sum of $5,000, which sum was credited by California Trust Company to the account of plaintiff.

(g) On April 7, 1950, defendant executed a notice of his election to purchase 1,000 shares under the option agreement. On May 6, 1950, California Trust company issued certificates Nos. 3693 through 3702, each for 100 shares, representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On May 8, 1950, defendant caused to be paid to

California Trust Company the sum of $5,000, which sum was credited by California Trust Company to the account of plaintiff.

III.

Defendant entered into the following transactions involving sales of shares of plaintiff:

(a) On March 24, 1949, defendant sold 200 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $1,573.86, and delivered to the broker certificates Nos. 1343 and 1465, each for 100 shares, to effect the sale.

(b) On March 28, 1949, defendant sold 200 shares through [61] Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $1,648.10, and delivered to the broker certificates Nos. 2208 and 2209, each for 100 shares, to effect the sale.

(c) On March 29, 1949, defendant sold 300 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $2,509.29, and delivered to the broker certificates Nos. 2204 through 2206, each for 100 shares, to effect the sale.

(d) On March 29, 1949, defendant sold 200 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $1,623.36, and delivered to the broker certificates Nos. 2203 and 2207, each for 100 shares, to effect the sale.

(e) On April 2, 1949, defendant sold 500 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $4,429.66, and delivered to the broker certificates Nos. 2228

through 2232, each for 100 shares, to effect the sale.

(f) On April 2, 1949, defendant sold 500 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $4,553.45, and delivered to the broker certificates Nos. 2233 through 2237, each for 100 shares, to effect the sale.

(g) On August 8, 1949, defendant sold 100 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $1,370.48, and delivered to the broker certificate No. 1344, for 100 shares, to effect the sale.

(h) On September 30, 1949, defendant sold 200 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $2,765.84, and delivered to the broker certificates Nos. 2278 and 2279, each for 100 shares, to effect the sale.

(i) On October 4, 1949, defendant sold 60 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $827.87, and delivered to the broker certificates No. L936 for 50 shares and No. L937 for 10 shares, to effect the sale.

(j) On December 13, 1949, defendant sold 100 shares through [62] Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $2,527.13, and delivered to the broker certificate No. 2210 for 100 shares to effect the sale.

(k) On February 21, 1950, defendant sold 100 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $2,178.89, and delivered to the broker certificate No. 2211 for 100 shares to effect the sale.

(l) On April 25, 1950, defendant sold 100 shares

through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $2,104.26, and delivered to the broker certificate No. 2212 for 100 shares to effect the sale.

IV.

The range of prices at which shares of the plaintiff were bought and sold on the Los Angeles Stock Exchange, the bid and asked prices at which the shares were quoted on the Exchange on the days when no sales were effected, and the midpoint of such range or bid and asked prices were as follows, on the following listed dates:

Date		High	Low	Bid	Asked	Midpoint
8/21/46	Not Listed			4⅜	4⅞	4⅝
4/17/47	Not Listed			2¾	3¼	3
4/17/48	Not Listed			5⅛	5⅝	5⅜
3/28/49		8½	8¼			8⅜
4/ 2/49		9¼	8¾			9
4/ 6/49		9⅛	9⅛			9⅛
4/11/49		10½	10¼			10⅜
4/16/49	(Saturday)*	No Sales		10¾	10⅞	10.81
4/18/49	(Monday)	11	10¾			10⅞
8/30/49				13½	13¾	13⅝
9/ 2/49**	No Sales			13⅜	13¾	13.5625
9/ 6/49**	No Sales			13⅛	13⅝	13⅜
9/23/49		14	13⅞			13.9375
1/ 5/50				25½	26	25¾
3/ 2/50		21½	21½			21½
3/ 6/50				20¾	21½	21.125
3/20/50				20¾	21⅝	21.1875
4/ 7/50	Closed—Good Friday					
4/17/50		20	20			20
5/ 6/50		25	24½			24¾
5/ 8/50		25	25			25

* April 17, 1949, was Sunday.

** Exchange closed Saturday, September 3, 1949, and Monday, September 4, 1949.

V.

The dates on which the midpoint between the highest and lowest sales on the Los Angeles Stock Exchange was the lowest, during the following designated periods, and the high and low prices, and the midpoints on such dates, were as follows:

Period	Date	High	Low	Midpoint
9/26/48 - 3/24/49	1/ 5/49	6¾	6⅝	6.6875
9/30/48 - 3/28/49	1/ 5/49	6¾	6⅝	6.6875
10/ 1/48 - 3/29/49	1/ 5/49	6¾	6⅝	6.6875
10/ 4/48 - 4/ 2/49	1/ 5/49	6¾	6⅝	6.6875
2/10/49 - 8/ 8/49	2/11/49	7	7	7
3/24/49 - 9/22/49	3/24/49	8	7¾	7⅞
3/28/49 - 9/26/49	3/28/49	8½	8¼	8⅜
3/29/49 - 9/27/49	4/ 1/49	8½	8½	8½
4/ 1/49 - 9/30/49	4/ 1/49	8½	8½	8½
4/ 2/49 - 9/30/49	4/ 2/49	9¼	8¾	9
4/ 6/49 - 10/ 4/49	4/ 6/49	9⅛	9⅛	9⅛
6/15/49 - 12/13/49	6/15/49	10⅞	10⅞	10⅞
8/ 8/49 - 2/ 6/50	9/12/49	13⅛	13⅛	13⅛
8/23/49 - 2/21/50	9/12/49	13⅛	13⅛	13⅛
9/30/49 - 3/28/50	10/ 1/49	13½	13½	13½
10/ 4/49 - 4/ 2/50	10/ 4/49	14½	13⅞	14.1875
10/27/49 - 4/25/50	11/ 6/49	17	17	17
12/13/49 - 6/11/50	3/27/50	19¼	19¼	19¼
2/21/50 - 8/19/50	7/18/50	19½	19⅛	19.3125
4/25/50 - 10/23/50	7/18/50	19½	19⅛	19.3125

VI.

At all times mentioned in this stipulation defendant and King Turnbull Bradburn were, and now are, husband and wife, and were, and now are, residents of the State of California. Any reference in this stipulation to the acquisition or sale of the shares of plaintiff by defendant shall be without prejudice to any claim of defendant that

the shares acquired were acquired with, and were, community property of defendant and King Turnbull Bradburn, his wife, and that the proceeds of the sales of the shares were, and are, community property of defendant and King Turnbull Bradburn.

VII.

The stock of the corporation was listed on the Los Angeles Stock Exchange, a national securities exchange, on April 23, 1948, and has been so listed at all times subsequent thereto. Prior to said date said stock was not listed on any national securities exchange.

VIII.

The Option Agreement between plaintiff and defendant was one of a series of sixteen such agreements between plaintiff and a group of plaintiff's key employees, executed as an incentive plan to encourage said employees to remain in the employ of plaintiff at the salary that plaintiff was then able to pay and to use their best efforts in the interest of plaintiff.

IX.

Defendant has been continuously employed by plaintiff since and prior to the time of said Option Agreement, and to the date of [65] this stipulation.

X.

At the time said Option Agreement was entered into the fair market value of the shares of plaintiff was less than $5.00 per share.

XI.

There is attached hereto as Exhibit "B" a true and correct copy of the permit issued by the Division of Corporations of the State of California on July 23, 1946, authorizing plaintiff to enter into the option agreement with defendant and to sell shares pursuant thereto.

XII.

Between March 24, 1949, and April 25, 1950, plaintiff had a minimum of 176,790 shares of its common capital stock outstanding, of which, during the same period, defendant at no time owned more than 2,100 shares.

XIII.

During the periods here involved King Turnbull Bradburn owned no shares of stock of plaintiff except whatever community property interest she may have possessed in the shares of stock standing in the name of defendant.

XIV.

At no time has King Turnbull Bradburn been either an officer or a director of plaintiff.

B. Statement of Facts Which Parties Are Unable to Concede

Plaintiff is unable to concede the following facts, but does not, as presently advised, intend to contest by evidence to the contrary:

(a) That the options held in the names of the defendants, any and all shares of stock of plaintiff

acquired in the name of defendants, and all proceeds arising from the exercise of any such option or from the sale or disposition of any such [66] shares were at all times, and now are, the community property of the defendants and their respective spouses;

(b) That defendants were induced to remain as employees of plaintiff by reason of the execution of the option agreements, or that they remained in such employment in reliance upon the benefits of said option agreements;

(c) That the defendants and their wives were unable to purchase shares under the option agreements, or to pay tax accruing upon such purchases, without selling a portion of such shares substantially at the same time.

C. Statement of Plaintiff's Objections to Admissibility of Stipulated Facts

Plaintiff reserves the following objections to the admissibility in evidence of the following facts:

(a) The facts set forth in Paragraph VIII herein, on the ground that said facts are irrelevant and immaterial, and, under decided cases, have no bearing upon the determination of liability under Section 16(b) of the Securities Exchange Act of 1934 or on the amount of damages recoverable under said section.

(b) The facts set forth in Paragraph X herein, on the ground that said facts are irrelevant and immaterial, and, under decided cases, have no bearing upon the determination of liability under Sec-

tion 16(b) of the Securities Exchange Act of 1934 or on the amount of damages recoverable under said section.

LATHAM & WATKINS,

By /s/ AUSTIN H. PECK, JR.,
Attorneys for Plaintiff.

WILLIS SARGENT and
SIDNEY H. WYSE,

By /s/ SIDNEY H. WYSE,
Attorneys for Defendant.

Dated May 25, 1951. [67]

EXHIBIT A

Option Agreement

This Option Agreement made and entered into this 21st day of August, 1946, but effective as of April 18, 1946, by and between Consolidated Engineering Corporation, a California corporation, hereinafter referred to as Consolidated, and James R. Bradburn, a resident of Pasadena, California, hereinafter called Bradburn.

Witnesseth

That Consolidated does hereby grant to Bradburn an option to purchase a total of not to exceed 5,000 shares of its common capital stock of the par value of $1.00 per share upon the following terms and conditions:

(1) The total number of shares, option to purchase which is hereby granted to Bradburn, is 5,000.

(2) The term of this agreement shall commence on April 18, 1946, and shall expire on July 15, 1951, unless prior to said time this agreement has otherwise terminated.

(3) The option to purchase hereby given shall be exercisable only in the following manner:

(a) For the first year of this agreement, Bradburn shall have an option to purchase up to but not to exceed 1,000 shares, which option shall be exercisable on or after April 17, 1947;

(b) For the second year of this agreement, up to but not to exceed an additional 1,000 shares, which option shall be exercisable on or after April 17, 1948;

(c) For the third year of this agreement, up to but not to exceed an additional 1,000 shares, which option shall be exercisable on or after April 17, 1949;

(d) For the fourth year of this agreement, up to but not to exceed an adidtional 1,000 shares, which option shall be exercisable on or after April 17, 1950;

(e) For the fifth year of this agreement, up to but not to exceed an additional 1,000 shares, which option shall be exercisable or on after April 17, 1951. [68]

(4) All of the options hereby given, and par-

ticularly described in paragraph (3) above, shall, unless this agreement is sooner terminated, expire on July 15, 1951. The exercise by Bradburn of his option in part only as to shares for any year shall not be deemed to limit in any way his right to exercise his option as to the balance of said shares so long as his option is in effect and this agreement has not been terminated.

(5) If he shall elect to exercise the options hereby given, either in whole or in part, and whether at one time or from time to time, Bradburn shall forthwith give written notice thereof to Consolidated. Such notice shall be in writing, addressed to Consolidated, for the attention of the Secretary, and sent by registered mail, postage prepaid. Said notice, to be effective, shall specify the number of shares as to which the option is exercised, and the denomination and the name or names in which the certificate or certificates evidencing the shares shall be issued, and shall be accompanied by certified or cashier's check for the full amount of the purchase price of the shares to be issued. Upon receipt of such notice, and the purchase price of the shares to be issued, Consolidated will issue, or cause to be issued, certificates evidencing the shares so purchased.

(6) The price at which any of the shares subject to the options hereby granted are to be sold is $5.00 per share.

(7) This agreement shall automatically termi-

nate prior to July 15, 1951, upon the happening of any of the following events:

(a) The exercise by Bradburn of all of the options hereby granted and the completion of payment for and delivery of the shares as to which the options have been exercised.

(b) The death of Bradburn.

(c) Termination of Bradburn's employment with Consolidated, whether for cause or otherwise, and whether voluntary or involuntary insofar as either party is concerned.

(d) Any attempt by Bradburn to assign all or any part of his rights hereunder. [69]

(e) The mutual agreement of the parties hereto. Upon termination hereof, any options hereby granted and then unexercised shall forthwith terminate and be of no further force or effect.

(8) It is understood and agreed that this agreement shall not become effective for any purpose unless and until a proper permit has been obtained from the Commissioner of Corporations of the State of California (a) authorizing the granting by Consolidated of the options hereby given, and (b) authorizing the issuance of the stock of Consolidated pursuant to the exercise of said options.

If at any time the permit or permits so obtained shall be revoked, or shall expire for reasons not within the control of Consolidated, then in such event Consolidated shall be relieved of any further obligation to issue any of its shares hereunder.

(9) If at any time subsequent to the effective date hereof Consolidated shall declare a stock dividend on its outstanding common stock, or shall make effective a stock-split, it is agreed that Bradburn's option to purchase shall be adjusted to give effect thereto. By way of illustration of the foregoing, if Consolidated should hereafter declare a stock dividend of one common share on each common share outstanding, Bradburn's option thereafter shall be to purchase two shares for each share subject to option prior to the dividend, and the price for the two shares shall be $5.00, or $2.50 per share.

(10) This agreement shall not be assignable either in whole or in part by Bradburn.

(11) This agreement shall inure to the benefit of and be binding upon the successors and/or assigns of Consolidated.

(12) Time is of the essence hereof.

CONSOLIDATED ENGINEERING CORPORATION.

By /s/ PHILIP S. FOGG,

By /s/ JAMES B. CHRISTIE,

/s/ JAMES R. BRADBURN. [70]

EXHIBIT B

Before the Department of Investment Division of Corporations of the State of California

In the matter of the application of "CONSOLIDATED ENGINEERING CORPORATION" for a permit authorizing it to sell and issue its securities.

Permit

File No. 65446LA
Receipt No. LA A31774

This Permit Does Not Constitute a Recommendation or Endorsement of the Securities Permitted to Be Issued, but Is Permissive Only.

"Consolidated Engineering Corporation,"

a California corporation, is hereby authorized to sell and issue its securities as hereinbelow set forth:

1. To sell and issue to James R. Bradburn, William D. Nesbit and Paul F. Hawley option agreements substantially in the form and tenor of the copy contained in the amendment to application filed with the Commissioner of Corporations July 19, 1946, and pursuant thereto to sell and issue to them an aggregate of not to exceed 15,000 of its shares, at and for the price of $5.00 per share, cash, lawful money of the United States, for the uses and purposes recited in its application as modified by the amendment thereto, and so as to net applicant the full amount of the selling price thereof.

This permit is issued upon the following condition:

(a) That unless revoked or suspended, or renewed upon [71] application filed on or before the date of expiration specified in this condition, all authority to sell securities under paragraph 1 of this permit shall terminate and expire on the 15th day of July, 1951.

Dated: Los Angeles, California, July 23, 1946.

EDWIN M. DAUGHERTY,
Commissioner of Corporations.

By /s/ J. A. HAHN,
Assistant Commissioner.

[Endorsed]: Filed May 28, 1951. [72]

District Court of the United States, Southern District of California, Central Division

No. 12,582-HW

CONSOLIDATED ENGINEERING CORPORATION, a California Corporation,

Plaintiff,

vs.

WILLIAM D. NESBIT,

Defendant.

No. 12,583-HW

CONSOLIDATED ENGINEERING CORPORATION, a California Corporation,

Plaintiff,

vs.

HUGH F. COLVIN,

Defendant.

No. 12,584-HW

CONSOLIDATED ENGINEERING CORPORATION, a California Corporation,

Plaintiff,

vs.

JAMES R. BRADBURN,

Defendant.

OPINION

The plaintiff in the above-entitled actions had among its personnel some sixteen key employees. Being unable to pay its employees additional com-

pensation to induce them to remain in the employ of plaintiff corporation in such key positions, in lieu thereof the corporation gave to each of its sixteen key employees an option agreement, covering a period of five years, which gave to these key employees the right to purchase, at a price of $5.00 per share, certain shares of plaintiff corporation's common capital stock, having a par value of $1.00 per share.

Among other things, it was provided that the option agreement should not be effective for any purpose unless and until proper permits were obtained from the Commissioner of Corporations of the State of California, authorizing the granting by said corporation of the options and authorizing the issuance of the stock of plaintiff corporation pursuant to the provisions of said options; and the options were terminated if these employees did not remain in the service of plaintiff corporation.

Plaintiff filed petitions with the Corporation Commissioner of the State of California, asking for authority to grant the options herein mentioned and to issue the stock, if and when the options were exercised. The petitions were granted by the Corporation Commissioner.

There is nothing in this case to indicate that defendants were anything but conscientious, honest employees. They were in no respect stock market manipulators. Evidence in the case indicates that the idea of the stock option contracts originated with Philip S. Fogg, President of Consolidated Engineering Corporation, prior to the listing of

plaintiff's stock on any national exchange, as a means of retaining the services of the sixteen key men and as [74] incentive to these men to use their best efforts for the benefit of the corporation. Included among the sixteen were the three defendants in these actions, they being the only employees holding the conventional titles of officers of the corporation.

At the time the option agreements were executed they had little value. After the options acquired a value (because of the rise in value of the stock) a meeting of the optionees was called by Mr. Fogg, at which meeting the tax problem incident to the exercise of the option agreements was brought to the attention of the option holders and suggestion was made that they be exercised annually to lessen the impact of tax accruing upon exercise of an option. The fact that optionees did not have additional resources sufficient to pay the tax and purchase stock, without concurrently selling a portion of their purchased stock, was discussed at the meeting. It was then made known to the optionees that they could (through a brokerage house of which one of the directors of plaintiff corporation was a partner) effect sales of stock in order to procure funds to take up their options.

The various employees commenced taking up options, in most cases using the forms prepared or suggested by plaintiff corporation. At no time from the date of the first listing of the stock on an Exchange to the date of the filing of the actions herein did the management of the corporation, or

anyone else, issue any bulletin, circular, letter, notice or any other document, calling the employees' attention to restrictions upon them under the Securities Exchange Act relative to purchase and sale of stock within the six months' period. [75]

Subsequent to the making of the option agreements, the stock of Consolidated Engineering Corporation was listed upon a Stock Exchange and thereby came under the provisions of the Securities Exchange Act. After the purchase and sale of the stock which is the subject matter of these actions, one Pellegrina, a stockholder of plaintiff corporation, demanded that plaintiff corporation commence an action under Title 15, §78p (b), to recover for the corporation the profits realized by defendants.

It appears that Pellegrina purchased ten shares of plaintiff corporation's stock in September, 1950, and within two weeks or a month after said purchase made demand that the corporation institute suits against the defendants named in these actions. Inasmuch as Pellegrina was not a stockholder at the time the option agreements were made and had purchased only ten shares of the corporation's stock and then immediately made demand that this action be commenced, it could be assumed that after learning of the profits realized by defendants herein he made his stock purchase for the sole purpose of making demand that these actions be instituted to recover for the corporation profits realized by defendants.

Section 78p of Title 15, USCA, provides in part as follows:

> "For the purpose of preventing unfair use of information * * * any profit realized by him (beneficial owner, director or officer) from any purchase and sale * * * within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any [76] intention on the part of such beneficial owner, director, or officer in entering into such transaction. * * * Suit to recover such profit may be instituted at law or in equity * * *."

It will be noted from the above that Section 78p does not make the purchase and sale of stock unlawful or irregular. It provides only that the profits, if any, shall be recovered by the corporation. Purchase and sale of stock connected with a debt previously contracted is exempt under the statute. The purpose of this section is "preventing unfair use of information."

There is no contention here that defendants in any way unfairly used information which they might have obtained as officers, directors or beneficial owners. In fact, it is stipulated that defendants at all times acted fairly and in good faith and were not stock manipulators in the usual sense of that term. Inasmuch as option agreements had been given to sixteen employees, it would seem

entirely unfair to impose a penalty upon the three defendants herein, when it is impossible to impose a like penalty upon the other key employees who did and performed the same acts as complained of in these actions but who did not happen to have conventional titles of "corporation officials."

The sole excuse for filing these actions was that defendants were "officers" of the corporation. Defendant Bradburn was vice-president, in charge of engineering; defendant Nesbit was vice-president, in charge of production, and defendant Colvin was treasurer. Because the other employees who had similar option agreements did not happen to be officers or directors of the corporation, they could exercise their options to purchase, and sell with immunity. It would [77] be extremely inequitable to penalize these three who held options and not similarly penalize the others. According to the section, its purpose is to "prevent unfair use of information." There is no imputation that these defendants or any of them unfairly used any information obtained through their relationship to plaintiff corporation.

It would seem to the Court that, under the circumstances as outlined, the corporation should now be estopped to recover profits of a transaction which the corporation itself initiated and set up and which it (at least inferentially) assured defendants was valid. However, plaintiff corporation contends that the statute indicates a broad public policy which should not be subject to waiver or estoppel, citing to the Court Slade vs. County of

Butte, 14 Cal. App. 453, to the effect that estoppel will not be enforced, unless in those exceptional cases where equity and good conscience forbid the relief sought.

If ever there was a case where equity and good conscience "would forbid the relief sought," it seems to the Court that the necessary facts are present in these cases at bar, inasmuch as it is established that in lieu of paying additional salary to retain the services of these employees, the option agreements were given; that the transaction was initiated and handled by plaintiff corporation herein and, before consummation, had to be approved by the Corporation Commissioner of the State of California; that nothing was ever intimated to any of the defendants that if they exercised their options and purchased any stock, reselling within six months at a profit, they would have to pay to the corporation the profits realized. As all the parties were acting in good faith, deeming the agreement valid, it would seem [78] most inequitable now, after the corporation has had the benefit and advantage of the option agreements for several years, to allow plaintiff corporation to recover from defendants in accordance with the prayers of its complaints.

The purpose of the law as set forth in the statute is to prevent unfair use of information. As stated before, when the option agreements were executed the stock in question was outside the purview or scope of the Securities Exchange Act. The agree-

ments were valid in every way. There were no inhibitions of any kind. Subsequent to the making of the option agreements, the stock was listed. The listing of the stock brought it within the purview of Section 78p, Title 15 USCA; however, there is nothing to indicate that the fundamental purpose of the Act has been violated in any way.

Neither plaintiff corporation nor the Securities Exchange Commission disputes that this is an equitable proceeding; consequently, the Court is free to apply equitable doctrines coextensive with the common law and used for centuries to alleviate hardship of rules of general application which result in injustice in exceptional cases. The hard rule of the law might indicate that judgment should be rendered in favor of plaintiffs, but equity dictates that judgment should be in favor of the defendants herein.

Judgment is ordered for the defendants; Findings of Fact and Conclusions of Law to be prepared by defendants.

Dated October 10, 1951.

/s/ HARRY C. WESTOVER,
District Judge.

[Endorsed]: Filed October 10, 1951. [79]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

An Order for Pre-Trial Proceedings having been made in the above-entitled action on March 7, 1951, and, pursuant to said Order, the parties having filed a Pre-Trial Stipulation, containing a stipulation of facts, a statement of facts which the parties are unable to concede, and a statement of plaintiff's objections to admissibility of certain stipulated facts, and thereafter, and further pursuant to said Order, plaintiff having filed its Pre-Trial Memorandum of Law, its Pre-Trial Statement of Issues, its Supplemental Pre-Trial Memorandum of Law and its Second Supplemental Pre-Trial Brief, and defendant having filed his Pre-Trial Memorandum of Law, his Pre-Trial Statement of Issues, his Supplemental Pre-Trial Memorandum of Law, his Supplemental Pre-Trial Brief and his Second Supplemental Pre-Trial Brief.

And said cause having been called for pre-trial hearing on [80] July 13, 1951, and having, by order of the above-entitled Court made on said day, been set for trial on July 20, 1951, on certain limited issues of fact raised by the allegations contained in defendant's second, third, fourth and sixth defenses, contained in defendant's Amended Answer, and not stipulated or conceded by the plaintiff in the Pre-Trial Stipulation, and said matter having come on for trial on said limited issues on July 20, 1951, before the above-entitled Court, the Honorable Harry C. Westover, United States District Judge,

Judge Presiding, a jury not having been demanded by plaintiff; Latham and Watkins, by Austin H. Peck, Jr., and Clinton R. Stevenson, appearing as attorneys for plaintiff, and Willis Sargent and Sidney H. Wyse, by Sidney H. Wyse, appearing as attorneys for defendant, and evidence having been received on the part of the parties, and said cause having been ordered submitted for final decision by agreement of the parties upon the question of liability only, all matters with regard to damages and the measure thereof having been reserved for further proceedings, and the case having been so submitted by the respective parties;

And the Securities and Exchange Commission, by Louis Loss, Arden L. Andresen, Myer Feldman, Howard A. Judy and Hollis O. Black, its attorneys, having thereafter moved said Court for leave to file a memorandum as amicus curiae, and said motion having been granted on September 10, 1951, and the Securities and Exchange Commission having filed its Memorandum as Amicus Curiae, and defendant having filed his Memorandum in Opposition to Memorandum filed by Securities and Exchange Commission as Amicus Curiae, and the Securities and Exchange Commission having submitted an informal memorandum, in letter form, to the Judge Presiding in answer to defendant's said memorandum, and the Court being fully advised and having considered the stipulations of the parties and the testimony produced, hereby makes its Findings of Fact on the [81] issues raised between plaintiff's Complaint and defendant's

Amended Answer, such findings being limited to issues raised by the second, third, fourth and sixth defenses contained in said Amended Answer, and further makes its Conclusions of Law therefrom, as follows:

Findings of Fact

I.

On August 21, 1946, plaintiff and defendant entered into an option agreement, by the terms of which defendant was given the right to purchase shares of plaintiff at a price of five ($5.00) dollars per share, during a period of five years, so long as defendant remained an employee of plaintiff. The option agreement was one of a series of similar agreements between plaintiff and sixteen of plaintiff's key employees, all executed prior to the listing of plaintiff's stock on any national securities exchange, as an incentive to these employees to remain in the employment of plaintiff and to use their best efforts for the benefit of plaintiff, and in lieu of additional compensation which plaintiff was unable to pay. Defendant was induced to remain as an employee of plaintiff at the salary offered by plaintiff by reason of the existence of the option agreement and, in reliance thereon, defendant has been continuously employed by plaintiff since the date of the option agreement and to and including the date of the trial of this action.

II.

The option agreement between plaintiff and defendant further provided that it should not be

effective for any purpose unless and until proper permits for the issuance of the option agreement and the shares provided for therein were obtained from the Commissioner of Corporations of the State of California. Prior to the execution of the option agreement and prior to the issuance of any shares thereunder, plaintiff applied for and obtained [82] a permit from the Commissioner of Corporations of the State of California permitting the execution of the option agreement and the issuance of the stock provided for therein.

III.

At all times up to and including the date of the option agreement the reasonable market value of plaintiff's stock was less than five ($5.00) dollars per share. During the period from the date of the option agreement to the date of the trial of this action plaintiff's operations were successful and plaintiff's stock appreciated substantially in market value. The success of plaintiff was the result, in a substantial degree, of the efforts of the 16 key employees holding option agreements, including the defendant in this case, and during this period plaintiff received the benefit of such efforts.

IV.

During the period covered by plaintiff's complaint, defendant was unable to purchase shares under the option agreement and to pay the taxes accruing upon such purchases, without concurrently selling a portion of his purchased stock, which said

facts were at all times known to plaintiff. Subsequent to the listing of plaintiff's stock on a national securities exchange and subsequent to the rise in value of plaintiff's stock to a price higher than the price contained in said option agreement, plaintiff, through its officers, suggested to said 16 key employees, including the defendant herein, that said options be exercised annually, to lessen the impact of the tax accruing upon said options, and plaintiff further made known to said key employees that they could effect sales of stock in order to procure funds to take up their options through a brokerage house of which one of the directors of plaintiff was a partner.

V.

Said options were so taken up by said 16 employees, including [83] the defendant herein, and such sales made by said employees, including defendant herein, using, in most cases, forms prepared or suggested by plaintiff. At no time from the date of the listing of the stock of plaintiff on a national securities exchange to the date of the filing of this action, did plaintiff issue any bulletin, circular, letter, notice or other document, calling the attention of plaintiff's employees, including this defendant, to the restrictions upon them or him under the Securities Exchange Act of 1934, relative to purchase and sale of stock within a six months' period.

VI.

In the purchases and sales of the stock of plaintiff by defendant, during the periods alleged in

plaintiff's complaint, defendant did not make unfair use, or any use, of information obtained by defendant by reason of defendant's relationship to plaintiff as an officer or director, and defendant was at all times a conscientious and honest employee and acted fairly and in good faith in said transactions.

VII.

Plaintiff, by its actions herein, is estopped from recovering profits, if any, from the transactions of defendant in the stock of plaintiff under said option agreement which plaintiff initiated and set up and which plaintiff, at least inferentially, assured defendant to be valid.

Conclusions of Law

I.

This is a suit in equity under Section 16 (b) of the Securities Exchange Act of 1934.

II.

It is inequitable to hold defendant liable for profits, if any, realized in the transactions here involved, while other employees holding identical options may purchase and sell stock of [84] plaintiff without such liability.

III.

Plaintiff is estopped from asserting liability against defendant by reason of the facts herein found.

IV.

The fundamental purposes of the Securities Exchange Act of 1934 have not been violated in any way by reason of the actions of the defendant.

Judgment is therefore ordered for the defendant and against the plaintiff.

Dated this 30th day of October, 1951.

/s/ HARRY C. WESTOVER,
District Judge.

Approved as to form:

LATHAM & WATKINS.

By .....,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 30, 1951.

In the District Court of the United States in and for the Southern District of California, Central Division

No. 12,582-HW—Civil

CONSOLIDATED ENGINEERING CORPORATION, a California Corporation,

Plaintiff,

vs.

WILLIAM D. NESBIT,

Defendant.

JUDGMENT

(In Favor of Defendant After Trial by Court)

The above-entitled case having been submitted for final determination and decision, following pretrial proceedings and trial on July 20, 1951, of certain issues of fact, before the Court, without a jury, the Honorable Harry C. Westover, United States District Judge, Judge Presiding; Latham & Watkins, by Austin H. Peck, Jr., and Clinton R. Stevenson, appearing as attorneys for plaintiff, and Willis Sargent and Sidney H. Wyse, by Sidney H. Wyse, appearing as attorneys for defendant, and the Court having duly considered the stipulations, the testimony and the briefs filed by the parties, and having further duly considered briefs filed by the Securities and Exchange Commission, as amicus curiae, and being fully advised; [87]

And the Court having heretofore made and filed its Findings of Fact, Conclusions of Law, Opinion and Order for Judgment,

Now, therefore, pursuant thereto,

It is hereby ordered and adjudged that plaintiff take nothing by this action.

Dated this 30th day of October, 1951.

/s/ HARRY C. WESTOVER,
District Judge.

Approved as to form:

LATHAM & WATKINS.

By .....,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 30, 1951.

[Title of District Court and Cause.]

No. 12,583-HW—Civil

FINDINGS OF FACT AND CONCLUSIONS OF LAW

An Order for Pre-Trial Proceedings having been made in the above-entitled action on March 7, 1951, and, pursuant to said Order, the parties having filed a Pre-Trial Stipulation, containing a stipulation of facts, a statement of facts which the parties are unable to concede, and a statement of plaintiff's objections to admissibility of certain stipulated facts, and thereafter, and further pursuant to said

Order, plaintiff having filed its Pre-Trial Memorandum of Law, its Pre-Trial Statement of Issues, its Supplemental Pre-Trial Memorandum of Law and its Second Supplemental Pre-Trial Brief, and defendant having filed his Pre-Trial Memorandum of Law, his Pre-Trial Statement of Issues, his Supplemental Pre-Trial Memorandum of Law, his Supplemental Pre-Trial Brief and his Second Supplemental Pre-Trial Brief;

And said cause having been called for pre-trial hearing on [90] July 13, 1951, and having, by order of the above-entitled Court made on said day, been set for trial on July 20, 1951, on certain limited issues of fact raised by the allegations contained in defendant's second, third, fourth and sixth defenses, contained in defendant's Amended Answer, and not stipulated or conceded by the plaintiff in the Pre-Trial Stipulation, and said matter having come on for trial on said limited issues on July 20, 1951, before the above-entitled Court, the Honorable Harry C. Westover, United States District Judge, Judge Presiding, a jury not having been demanded by plaintiff; Latham and Watkins, by Austin H. Peck, Jr., and Clinton R. Stevenson, appearing as attorneys for plaintiff, and Willis Sargent and Sidney H. Wyse, by Sidney H. Wyse, appearing as attorneys for defendant, and evidence having been received on the part of the parties, and said cause having been ordered submitted for final decision by agreement of the parties upon the question of liability only, all matters with regard to damages and the measure thereof having been reserved for

further proceedings, and the case having been so submitted by the respective parties;

And the Securities and Exchange Commission, by Louis Loss, Arden L. Andresen, Myer Feldman, Howard A. Judy and Hollis O. Black, its attorneys, having thereafter moved said Court for leave to file a memorandum as amicus curiae, and said motion having been granted on September 10, 1951, and the Securities and Exchange Commission having filed its Memorandum as Amicus Curiae, and defendant having filed his Memorandum in Opposition to Memorandum filed by Securities and Exchange Commission as Amicus Curiae, and the Securities and Exchange Commission having submitted an informal memorandum, in letter form, to the Judge Presiding in answer to defendant's said memorandum, and the Court being fully advised and having considered the stipulations of the parties and the testimony produced, hereby makes its Findings of Fact on the [91] issues, raised between plaintiff's Complaint and defendant's Amended Answer, such findings being limited to issues raised by the second, third, fourth and sixth defenses contained in said Amended Answer, and further makes its Conclusions of Law therefrom, as follows:

Findings of Fact

I.

On August 14, 1947, plaintiff and defendant entered into an option agreement, by the terms of which defendant was given the right to purchase

shares of plaintiff at a price of five ($5.00) dollars per share, during a period of five years, so long as defendant remained an employee of plaintiff. The option agreement was one of a series of similar agreements between plaintiff and sixteen of plaintiff's key employees, all executed prior to the listing of plaintiff's stock on any national securities exchange, as an incentive to these employees to remain in the employment of plaintiff and to use their best efforts for the benefit of plaintiff, and in lieu of additional compensation which plaintiff was unable to pay. Defendant was induced to remain as an employee of plaintiff at the salary offered by plaintiff by reason of the existence of the option agreement and, in reliance thereon, defendant has been continuously employed by plaintiff since the date of the option agreement and to and including the date of the trial of this action.

II.

The option agreement between plaintiff and defendant further provided that it should not be effective for any purpose unless and until proper permits for the issuance of the option agreement and the shares provided for therein were obtained from the Commissioner of Corporations of the State of California. Prior to the execution of the option agreement and prior to the issuance of any shares thereunder, plaintiff applied for and obtained [92] a permit from the Commissioner of Corporations of the State of California permitting the execution of the option agreement and the issuance of the stock provided for therein.

III.

At all times up to and including the date of the option agreement the reasonable market value of plaintiff's stock was less than five ($5.00) dollars per share. During the period from the date of the option agreement to the date of the trial of this action plaintiff's operations were successful and plaintiff's stock appreciated substantially in market value. The success of plaintiff was the result, in a substantial degree, of the efforts of the 16 key employees holding option agreements, including the defendant in this case, and during this period plaintiff received the benefit of such efforts.

IV.

During the period covered by plaintiff's complaint, defendant was unable to purchase shares under the option agreement and to pay the taxes accruing upon such purchases, without concurrently selling a portion of his purchased stock, which said facts were at all times known to plaintiff. Subsequent to the listing of plaintiff's stock on a national securities exchange and subsequent to the rise in value of plaintiff's stock to a price higher than the price contained in said option agreement, plaintiff, through its officers, suggested to said 16 key employees, including the defendant herein, that said options be exercised annually, to lessen the impact of the tax accruing upon said options, and plaintiff further made known to said key employees that they could effect sales of stock in order to procure funds to take up their options through a brokerage

house of which one of the directors of plaintiff was a partner.

V.

Said options were so taken up by said 16 employees, including [93] the defendant herein, and such sales made by said employees, including defendant herein, using, in most cases, forms prepared or suggested by plaintiff. At no time from the date of the listing of the stock of plaintiff on a national securities exchange to the date of the filing of this action, did plaintiff issue any bulletin, circular, letter, notice or other document, calling the attention of plaintiff's employees, including this defendant, to the restrictions upon them or him under the Securities Exchange Act of 1934, relative to purchase and sale of stock within a six months' period.

VI.

In the purchases and sales of the stock of plaintiff by defendant, during the periods alleged in plaintiff's complaint, defendant did not make unfair use, or any use, of information obtained by defendant by reason of defendant's relationship to plaintiff as an officer or director, and defendant was at all times a conscientious and honest employee and acted fairly and in good faith in said transactions.

VII.

Plaintiff, by its actions herein, is estopped from recovering profits, if any, from the transactions of defendant in the stock of plaintiff under said option agreement which plaintiff initiated and set up and

which plaintiff, at least inferentially, assured defendant to be valid.

Conclusions of Law

I.

This is a suit in equity under Section 16 (b) of the Securities Exchange Act of 1934.

II.

It is inequitable to hold defendant liable for profits, if any, realized in the transactions here involved while other employees holding identical options may purchase and sell stock of [94] plaintiff without such liability.

III.

Plaintiff is estopped from asserting liability against defendant by reason of the facts herein found.

IV.

The fundamental purposes of the Securities Exchange Act of 1934 have not been violated in any way by reason of the actions of the defendant.

Judgment is therefore ordered for the defendant and against the plaintiff.

Dated this 30th day of October, 1951.

/s/ HARRY C. WESTOVER,
District Judge.

Approved as to form:

LATHAM & WATKINS.

By .....,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 30, 1951. [95]

In the District Court of the United States in and for the Southern District of California, Central Division

No. 12,583-HW—Civil

CONSOLIDATED ENGINEERING CORPORATION, a California Corporation,

Plaintiff,

vs.

HUGH F. COLVIN,

Defendant.

JUDGMENT

(In Favor of Defendant After Trial by Court)

The above-entitled case having been submitted for final determination and decision, following pretrial proceedings and trial on July 20, 1951, of certain issues of fact, before the Court, without a jury, the Honorable Harry C. Westover, United States District Judge, Judge Presiding; Latham &

Watkins, by Austin H. Peck, Jr., and Clinton R. Stevenson, appearing as attorneys for plaintiff, and Willis Sargent and Sidney H. Wyse, by Sidney H. Wyse, appearing as attorneys for defendant, and the Court having duly considered the stipulations, the testimony and the briefs filed by the parties, and having further duly considered briefs filed by the Securities and Exchange Commission, as amicus curiae, and being fully advised; [97]

And the Court having heretofore made and filed its Findings of Fact, Conclusions of Law, Opinion and Order for Judgment,

Now therefore, pursuant thereto,

It is hereby ordered and adjudged that plaintiff take nothing by this action.

Dated this 30th day of October, 1951.

/s/ HARRY C. WESTOVER,
District Judge.

Approved as to form:

LATHAM & WATKINS.

By .....,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 30, 1951. [98]

[Title of District Court and Cause.]

No. 12,584-HW—Civil

FINDINGS OF FACT AND CONCLUSIONS OF LAW

An Order for Pre-Trial Proceedings having been made in the above-entitled action on March 7, 1951, and, pursuant to said Order, the parties having filed a Pre-Trial Stipulation, containing a stipulation of facts, a statement of facts which the parties are unable to concede, and a statement of plaintiff's objections to admissibility of certain stipulated facts, and thereafter, and further pursuant to said Order, plaintiff having filed its Pre-Trial Memorandum of Law, its Pre-Trial Statement of Issues, its Supplemental Pre-Trial Memorandum of Law and its Second Supplemental Pre-Trial Brief, and defendant having filed his Pre-Trial Memorandum of Law, his Pre-Trial Statement of Issues, his Supplemental Pre-Trial Memorandum of Law, his Supplemental Pre-Trial Brief and his Second Supplemental Pre-Trial Brief;

And said cause having been called for pre-trial hearing on [100] July 13, 1951, and having, by order of the above-entitled Court made on said day, been set for trial on July 20, 1951, on certain limited issues of fact raised by the allegations contained in defendant's second, third, fourth and sixth defenses, contained in defendant's Amended Answer, and not stipulated or conceded by the plaintiff in the Pre-Trial Stipulation, and said matter having come on

for trial on said limited issues on July 20, 1951, before the above-entitled Court, the Honorable Harry C. Westover, United States District Judge, Judge Presiding, a jury not having been demanded by plaintiff; Latham and Watkins, by Austin H. Peck, Jr., and Clinton R. Stevenson, appearing as attorneys for plaintiff, and Willis Sargent and Sidney H. Wyse, by Sidney H. Wyse, appearing as attorneys for defendant, and evidence having been received on the part of the parties, and said cause having been ordered submitted for final decision by agreement of the parties upon the question of liability only, all matters with regard to damages and the measure thereof having been reserved for further proceedings, and the case having been so submitted by the respective parties;

And the Securities and Exchange Commission, by Louis Loss, Arden L. Andresen, Myer Feldman, Howard A. Judy and Hollis O. Black, its attorneys, having thereafter moved said Court for leave to file a memorandum as amicus curiae, and said motion having been granted on September 10, 1951, and the Securities and Exchange Commission having filed its Memorandum as Amicus Curiae, and defendant having filed his Memorandum in Opposition to Memorandum filed by Securities and Exchange Commission as Amicus Curiae, and the Securities and Exchange Commission having submitted an informal memorandum, in letter form, to the Judge Presiding in answer to defendant's said memorandum, and the Court being fully advised and having considered the stipulations of the

parties and the testimony produced, hereby makes its Findings of Fact on the [101] issues, raised between plaintiff's Complaint and defendant's Amended Answer, such findings being limited to issues raised by the second, third, fourth and sixth defenses contained in said Amended Answer, and further makes its Conclusions of Law therefrom, as follows:

Findings of Fact

I.

On August 21, 1946, plaintiff and defendant entered into an option agreement, by the terms of which defendant was given the right to purchase shares of plaintiff at a price of five ($5.00) dollars per share, during a period of five years, so long as defendant remained an employee of plaintiff. The option agreement was one of a series of similar agreements between plaintiff and sixteen of plaintiff's key employees, all executed prior to the listing of plaintiff's stock on any national securities exchange, as an incentive to these employees to remain in the employment of plaintiff and to use their best efforts for the benefit of plaintiff, and in lieu of additional compensation which plaintiff was unable to pay. Defendant was induced to remain as an employee of plaintiff at the salary offered by plaintiff by reason of the existence of the option agreement and, in reliance thereon, defendant has been continuously employed by plaintiff since the date of the option agreement and to and including the date of the trial of this action.

II.

The option agreement between plaintiff and defendant further provided that it should not be effective for any purpose unless and until proper permits for the issuance of the option agreement and the shares provided for therein were obtained from the Commissioner of Corporations of the State of California. Prior to the execution of the option agreement and prior to the issuance of any shares thereunder, plaintiff applied for and obtained [102] a permit from the Commissioner of Corporations of the State of California permitting the execution of the option agreement and the issuance of the stock provided for therein.

III.

At all times up to and including the date of the option agreement the reasonable market value of plaintiff's stock was less than five ($5.00) dollars per share. During the period from the date of the option agreement to the date of the trial of this action plaintiff's operations were successful and plaintiff's stock appreciated substantially in market value. The success of plaintiff was the result, in a substantial degree, of the efforts of the 16 key employees holding option agreements, including the defendant in this case, and during this period plaintiff received the benefit of such efforts.

IV.

During the period covered by plaintiff's complaint, defendant was unable to purchase shares

under the option agreement and to pay the taxes accruing upon such purchases, without concurrently selling a portion of his purchased stock, which said facts were at all times known to plaintiff. Subsequent to the listing of plaintiff's stock on a national securities exchange and subsequent to the rise in value of plaintiff's stock to a price higher than the price contained in said option agreement, plaintiff, through its officers, suggested to said 16 key employees, including the defendant herein, that said options be exercised annually, to lessen the impact of the tax accruing upon said options, and plaintiff further made known to said key employees that they could effect sales of stock in order to procure funds to take up their options through a brokerage house of which one of the directors of plaintiff was a partner.

V.

Said options were so taken up by said 16 employees, including [103] the defendant herein, and such sales made by said employees, including defendant herein, using, in most cases, forms prepared or suggested by plaintiff. At no time from the date of the listing of the stock of plaintiff on a national securities exchange to the date of the filing of this action, did plaintiff issue any bulletin, circular, letter, notice or other document, calling the attention of plaintiff's employees, including this defendant, to the restrictions upon them or him under the Securities Exchange Act of 1934, relative to purchase and sale of stock within a six months' period.

VI.

In the purchases and sales of the stock of plaintiff by defendant, during the periods alleged in plaintiff's complaint, defendant did not make unfair use, or any use, of information obtained by defendant by reason of defendant's relationship to plaintiff as an officer or director, and defendant was at all times a conscientious and honest employee and acted fairly and in good faith in said transactions.

VII.

Plaintiff, by its actions herein, is estopped from recovering profits, if any, from the transactions of defendant in the stock of plaintiff under said option agreement which plaintiff initiated and set up and which plaintiff, at least inferentially, assured defendant to be valid.

Conclusions of Law

I.

This is a suit in equity under Section 16 (b) of the Securities Exchange Act of 1934.

II.

It is inequitable to hold defendant liable for profits, if any, realized in the transactions here involved while other employees holding identical options may purchase and sell stock of [104] plaintiff without such liability.

III.

Plaintiff is estopped from asserting liability

against defendant by reason of the facts herein found.

IV.

The fundamental purposes of the Securities Exchange Act of 1934 have not been violated in any way by reason of the actions of the defendant.

Judgment is therefore ordered for the defendant and against the plaintiff.

Dated this 30th day of October, 1951.

/s/ HARRY C. WESTOVER,
District Judge.

Approved as to form:

LATHAM & WATKINS.

By .....,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 30, 1951. [105]

In the District Court of the United States in and for the Southern District of California, Central Division

No. 12,584-HW—Civil

CONSOLIDATED ENGINEERING CORPORATION, a California Corporation,

Plaintiff,

vs.

JAMES R. BRADBURN,

Defendant.

JUDGMENT

(In Favor of Defendant After Trial by Court)

The above-entitled case having been submitted for final determination and decision, following pre-trial proceedings and trial on July 20, 1951, of certain issues of fact, before the Court, without a jury, the Honorable Harry C. Westover, United States District Judge, Judge Presiding; Latham & Watkins, by Austin H. Peck, Jr., and Clinton R. Stevenson, appearing as attorneys for plaintiff, and Willis Sargent and Sidney H. Wyse, by Sidney H. Wyse, appearing as attorneys for defendant, and the Court having duly considered the stipulations, the testimony and the briefs filed by the parties, and having further duly considered briefs filed by the Securities and Exchange Commission, as amicus curiae, and being fully advised; [107]

And the Court having heretofore made and filed its Findings of Fact, Conclusions of Law, Opinion and Order for Judgment;

Now therefore, pursuant thereto,

It is hereby ordered and adjudged that plaintiff take nothing by this action.

Dated this 30th day of October, 1951.

/s/ HARRY C. WESTOVER,
District Judge.

Approved as to form:

LATHAM & WATKINS.

By .....,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 30, 1951. [108]

[Title of District Court and Cause.]

Nos. 12,582-HW, 12,583-HW, and
12,584-HW—Civil

NOTICE OF MOTION TO INTERVENE

To Consolidated Engineering Corporation, plaintiff, and Latham & Watkins, its attorneys, and to William D. Nesbit, Hugh F. Colvin and James R. Bradburn, defendants, and Willis Sargent and Sidney H. Wyse, [110] their attorneys:

Notice Is Hereby Given that Carmelo J. Pellegrino will move this Court on the 29th day of

November, 1951, at 10 o'clock a.m., for leave to intervene as a plaintiff in the above numbered consolidated actions in order that he may prosecute an appeal from the judgments hitherto rendered in these actions, as a stockholder and representative of the plaintiff corporation.

KENNY AND MORRIS.

By /s/ ROBERT W. KENNY,

Attorneys for Carmelo J. Pellegrino, Applicant for Intervention.

ORDER

Good cause being shown, the time of hearing and notice of the same is shortened to November 29th, 1951, at 10 o'clock a.m., provided copies of said notice are served on counsel for plaintiff and defendants on or before November 27th, 1951, at 5 o'clock p.m.

/s/ LEON R. YANKWICH,
District Judge. [111]

[Endorsed]: Filed November 27, 1951.

[Title of District Court and Cause.]

Nos. 12,582-HW, 12,583-HW, and 12,584-HW

AFFIDAVIT IN SUPPORT OF APPLICATION FOR ORDER SHORTENING TIME

State of California,
County of Los Angeles—ss.

Robert W. Kenny, being first duly sworn, deposes and says that he is an attorney at law admitted to practice in the above-entitled Court, and that on November 23, 1951, he received a letter from Morris J. Levy, Attorney at Law, 261 Broadway, New York 7, [112] New York, requesting him to appear in this action for the purpose of seeking an order of intervention for Carmelo J. Pellegrino as plaintiff; that judgments in the above-entitled consolidated actions were entered by the District Court on October 30, 1951, and under the provisions of Rule 73 F.R.C.P. and Title 28 U.S.C. 2107, notice of appeal must be given within thirty (30) days from said date; that in order that Mr. Pellegrino may be given an opportunity to appeal the aforesaid judgment on behalf of the plaintiffs his motion to intervene must be heard on or before Thursday, November 29, 1951.

Affiant further states that he has been informed by New York counsel that Mr. Pellegrino is a stockholder of Consolidated Engineering Corporation and that the above-entitled actions were brought by the plaintiff corporation pursuant to his request dated October 2, 1950, and that a letter was re-

ceived on November 19, 1951, by New York counsel from Latham and Watkins, Esqs., attorneys for plaintiff Consolidated Engineering Corporation, stating that the Board of Directors of the said corporation had voted not to appeal from the aforementioned judgments.

/s/ ROBERT W. KENNY.

Subscribed and sworn to before me this 26th day of November, 1951.

[Seal] /s/ JANET MORONY,
Notary Public in and for
Said County and State.

Service of Copy attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 27, 1951. [113]

[Title of District Court and Cause.]

Nos. 12,582-HW, 12,583-HW, and 12,584-HW

AFFIDAVIT IN SUPPORT OF APPLICATION TO INTERVENE

State of New York,
County of Kings—ss.

Carmelo J. Pellegrino, being duly sworn, deposes and says:

I am and have been a stockholder of Consolidated Engineering Corporation since September 11, 1950.

I presently own two (2) shares of the common stock of said Corporation.

That this affidavit is submitted pursuant to Rule 24 of the Federal Rules of Civil Procedure in support of my application for leave to intervene in the above-entitled [116] action as a party plaintiff.

That by registered letter dated October 2, 1950, my attorney, Morris J. Levy, Esq., requested Consolidated Engineering Corporation to institute suit, as contemplated by Section 16(b) of the Securities Exchange Act of 1934, to recover the profits realized by Messrs. Hugh F. Colvin, James R. Bradburn and William D. Nesbit, officers and/or directors of the Corporation, from their respective purchases and sales and sales and purchases of the Corporation's common stock within periods of less than six months.

In the said letter my attorney informed the Corporation that in the event it did not institute such suit within sixty (60) days, I would commence such suit on its behalf in accordance with the provisions of Section 16(b) of the Securities Exchange Act of 1934.

That by letter dated October 11, 1950, addressed to my said attorney, Latham & Watkins, Esqs., attorneys for Consolidated Engineering Corporation, stated that they had "undertaken in behalf of Consolidated Engineering Corporation to make a full investigation of the facts involved and the law applicable thereto" and would advise him further with respect to the matter.

That by letter dated November 21, 1950, ad-

dressed to my attorney, the Corporation's counsel aforesaid stated that "we have this date filed complaints against Messrs. Bradburn, Nesbit and Colvin for the recovery of profits under Section 16(b) of the Securities Exchange Act of 1934. Enclosed you will find a copy of each complaint with its corresponding file number. We shall keep you informed of the progress of this litigation."

That by letter dated January 24, 1951, addressed to my attorney, the Corporation's counsel stated that "Enclosed for your files are copies of the answers filed by the defendants in the three cases above referred to." [117]

That by letter dated October 29, 1951, counsel for the Corporation advised my attorney that Judge Harry C. Westover had rendered his opinion dismissing the suits as against all of the defendants herein. A copy of the opinion and a copy of the Findings of Fact and Conclusions of Law was enclosed therein.

That after my attorney had studied Judge Westover's opinion he advised me that it was his opinion that Judge Westover had erred and that there was a good chance that the United States Court of Appeals would reverse the Judgment of the District Court if an appeal were taken therefrom.

I advised my attorney to ascertain whether the Corporation would take such appeal, and if not, I was prepared to appeal from the Judgment as a stockholder of the Corporation.

That by letter dated November 15, 1951, counsel for the Corporation advised my attorney that "At

a meeting of the Board of Directors of Consolidated Engineering Corporation held November 12, 1951, the Directors considered whether or not the Company should appeal from the decisions of the United States District Court entered October 30, 1951. We are advised that the Board of Directors by resolution decided that the Company would not take an appeal in any of the three cases."

That I thereupon instructed my attorney to take the necessary steps so that I, as stockholder of the Corporation, could appeal from the Judgments entered.

Wherefore, deponent respectfully requests that the within application for leave to intervene as a party plaintiff in the above-entitled actions be granted.

/s/ CARMELO J. PELLEGRINO.

Sworn to before me this 26th day of November, 1951.

[Seal] /s/ SOL BRAGIN,
Notary Public, State of
New York.

My commission expires March 30, 1952.

State of New York,
County of Kings—ss.

I, Francis J. Sinnott, Clerk of the County of Kings, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, having a seal, Do Hereby Certify, That Sol Bragin,

whose name is subscribed to the deposition, certificate of acknowledgment or proof of the annexed instrument, was at the time of taking the same a Notary Public in and for the State of New York, duly commissioned and sworn and qualified to act as such throughout the State of New York; that pursuant to law a commission, or a certificate of his appointment and qualifications, and his autograph signature, have been filed in my office; that as such Notary Public he was duly authorized by the laws of the State of New York to administer oaths and affirmations, to receive and certify the acknowledgment or proof of deeds, mortgages, powers of attorney and other written instruments for lands, tenements and hereditaments to be read in evidence or recorded in this State, to protest notes and to take and certify affidavits and depositions; and that I am well acquainted with the handwriting of such Notary Public, or have compared the signature on the annexed instrument with his autograph signature deposited in my office, and believe that the signature is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the said Court and County this 27 day of Nov., 1951.

[Seal] /s/ FRANCIS J. SINNOTT,
Clerk.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 29, 1951. [119]

In the District Court of the United States for the Southern District of California, Central Division

No. 12,582-HW

CONSOLIDATED ENGINEERING CORPORATION, a California Corporation,

Plaintiff,

vs.

WILLIAM D. NESBIT,

Defendant.

No. 12,583-HW

CONSOLIDATED ENGINEERING CORPORATION, a California Corporation,

Plaintiff,

vs.

HUGH F. COLVIN,

Defendant.

No. 12,584-HW

CONSOLIDATED ENGINEERING CORPORATION,

Plaintiff,

vs.

JAMES R. BRADBURN,

Defendant.

ORDER DENYING INTERVENTION

The petition of Carmelo J. Pellegrino for permission to intervene in the above-entitled consoli-

dated actions as a plaintiff intervenor having come on for hearing in the [120] above-entitled Court on November 29, 1951, and good cause being shown, the aforesaid motion is denied and Carmelo J. Pellegrino is hereby denied leave to intervene as plaintiff in the above-named consolidated actions.

Dated November 29th, 1951.

/s/ HARRY C. WESTOVER,
District Judge.

[Endorsed]: Filed November 29, 1951. [121]

[Title of District Court and Cause.]

Nos. 12,582-HW, 12,583-HW and 12,584-HW—Civil

NOTICE OF APPEAL

Notice Is Hereby Given that the applicant to intervene, Carmelo J. Pellegrino, hereby appeals to the United States Court [122] of Appeals for the Ninth Circuit from the Order denying him leave to intervene dated November 29, 1951.

Dated November 29, 1951.

KENNY AND MORRIS,

By /s/ ROBERT S. MORRIS, JR.,
Attorneys for Applicant
to Intervene.

[Endorsed]: Filed November 29, 1951. [123]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 138, inclusive, contain the original Complaint, Amended Answer and Pre-Trial Stipulation in each of the above-entitled causes; Opinion; Findings of Fact and Conclusions of Law and Judgment in each of the above-entitled causes; Notice of Motion to Intervene with Affidavit of Robert W. Kenny in Support; Affidavit of Carmelo J. Pellegrino in Support of Motion to Intervene; Order Denying Intervention; Notice of Appeal; Designation of Record and Point on Appeal in each of the above-entitled causes; and Designation of Additional Portions of Record on Appeal in each of the above-entitled causes which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 3d day of January, A.D. 1952.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13,220. United States Court of Appeals for the Ninth Circuit. Carmelo J. Pellegrino, Appellant, vs. William D. Nesbit, Hugh F. Colvin, James R. Bradburn and Consolidated Engineering Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed January 4, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13,220

CARMELO J. PELLEGRINO,

Appellant,

vs.

WILLIAM D. NESBIT, HUGH F. COLVIN, and JAMES R. BRADBURN,

Appellees.

STATEMENT OF THE POINT UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL, AND DESIGNATION OF THE PARTS OF THE RECORD WHICH APPELLANT THINKS NECESSARY FOR THE CONSIDERATION OF THE SAID POINT

To the Honorable Judge William Denman, and Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellant, Carmelo J. Pellegrino, respectfully states that the following is the point upon which he intends to rely on appeal, to wit:

The District Court erred in denying appellant's Motion to Intervene in each of the actions, which are entitled Consolidated Engineering Corporation, a California corporation, Plaintiff, vs. William D. Nesbit, Defendant, No. 12,582-HW; Consolidated Engineering Corporation, a California corporation,

Plaintiff, vs. Hugh F. Colvin, Defendant, No. 12,583-HW; and Consolidated Engineering Corporation, a California corporation, Plaintiff, vs. James R. Bradburn, Defendant, No. 12,584-HW.

Appellant designates all the record as certified to this Court by the Clerk of the United States District Court as necessary for the consideration of the foregoing Point on Appeal.

Respectfully submitted,

KENNY AND MORRIS,

By /s/ ROBERT S. MORRIS, JR.,
Attorneys for Appellant,
Carmelo J. Pellegrino.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 18, 1952.

No. 13220

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARMELO J. PELLEGRINO,

Appellant,

vs.

WILLIAM D. NESBIT, HUGH F. COLVIN, JAMES R. BRADBURN and CONSOLIDATED ENGINEERING CORPORATION,

Appellees.

APPELLANT'S OPENING BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Textbooks

No. 13220

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARMELO J. PELLEGRINO,

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vs.

WILLIAM D. NESBIT, HUGH F. COLVIN, JAMES R. BRADBURN and CONSOLIDATED ENGINEERING CORPORATION,

Appellees.

APPELLANT'S OPENING BRIEF.

Statement.

Appellant, Pellegrino, has appealed from a final order of the District Court of the United States, Southern District of California, Central Division, entered November 29, 1951, denying his motion for leave to intervene as plaintiff for the purpose of appealing from judgments made and entered October 30, 1951, in favor of each of the named individual appellees herein. [R. p. 118.]

Facts.

Appellant, Pellegrino, is and has been a stockholder of Consolidated Engineering Corporation (hereinafter referred to as Consolidated) since September 11, 1950. [R. p. 112.] In October, 1950, appellant, through his attorney, requested Consolidated to institute suit as contemplated by Section 16(b) of the Securities Exchange Act of 1934,* to recover the profits realized by appellees, Hugh F. Colvin, James R. Bradburn and William D. Nesbit, who were officers and/or directors of the corporation, as a result of their respective purchases and sales of Consolidated's common stock within periods of less than six months. [R. p. 113.] The said letter informed Consolidated that in the event it did not institute such suit within sixty (60) days, appellant would commence such action on its behalf in accordance with the provisions of Section 16(b) of the Act. [R. p. 113.] Thereafter appellant's attorney was advised by Consolidated that it had instituted suit against appellees, Bradburn, Nesbit and Colvin, for the recovery of "short swing" profits. [R. p. 114.] By letter dated October 29, 1951, counsel for Consolidated informed appellant's attorney that the District Court had rendered its opinion dismissing the complaints as against each of the defendants-appellees herein. [R. p. 114.] Judgments were made and entered thereon on October 30, 1951. [R. pp. 91-92, 99-100, 108-109.] Thereafter, by letter dated No-

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*See *infra,* page 4.

vember 15, 1951, counsel for Consolidated informed appellant's attorney that the Board of Directors of Consolidated had decided not to take an appeal from the judgments. [R. pp. 114-115.] Appellant was thereafter advised by his attorney that after careful study he was of the opinion that the District Court had erred in granting judgments for defendants-appellees in each of the cases. Appellant thereupon instructed his attorney to take the steps necessary to permit him, as a stockholder of Consolidated, to appeal from the judgments aforesaid. [R. pp. 114-115.]

Thereafter appellant, through his attorneys, made a motion for leave to intervene as plaintiff for the purpose of appealing from the judgments. [R. pp. 109-116.]

This motion, heard before the same District Judge who had granted the judgments for the defendants-appellees, was denied by order dated November 29, 1951. [R. pp. 117-118.]

Appellant thereupon filed his Notice of Appeal from this order. [R. p. 118.]

Issues Presented.

1. Did the District Court err in denying appellant stockholder's motion to intervene as plaintiff for the purpose of appealing from the judgments for defendants-appellees?

2. Did the District Court err in granting judgments in favor of the respective individual defendants-appellees herein?

POINT I.

The District Court Erred in Denying Appellant's Motion to Intervene as Plaintiff for the Purpose of Appealing From the Judgments Against the Corporation and in Favor of the Individual Defendants-Appellees Herein.

Section 16(b) of the Securities Exchange Act of 1934, 15 U. S. C. A., Section 78p(b), provides as follows:

> "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months, Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale

and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

Thus, Section 16(b) of the Act, *supra,* conferred an absolute right upon appellant, as a stockholder of Consolidated, to institute suit in its behalf to recover the "short swing" profits realized by the individual defendants-appellees herein provided, (1) Consolidated should "fail or refuse to bring such suit within sixty days after request," or (2) Consolidated should "fail diligently to prosecute the same thereafter."

Although Consolidated did institute such suits within sixty days after appellant's request, it has wholly failed and refused to prosecute an appeal from the judgments made against the corporation and in favor of the individual defendants-appellees.

In *Steinberg v. Sharpe* (S. D.-N. Y., 1950), 95 Fed. Supp. 32, aff'd (C. A. 2, 1951), 190 F. 2d 82, the facts were practically identical with those involved in the complaints by Consolidated against the individual defendants-appellees herein. In that case, the United States Court of Appeals affirmed Judge Medina's summary judgment against the defendant directing him to pay back to the corporation all the "short swing" profits which he had realized.

Thus, in the exercise of reasonable diligence, Consolidated should have appealed from the District Court's judgments made against it and in favor of the defendants-appellees. Its failure to do so certainly demonstrates that, after commencing the actions pursuant to

appellant's request, it has failed "diligently to prosecute the same thereafter."

Accordingly, appellant's motion to intervene for the purpose of prosecuting an appeal from the judgments aforesaid should have been granted *as a matter of right.*

As a stockholder of Consolidated, appellant has a substantial interest in the subject matter of these actions and will be bound by the final judgments and ultimate determinations thereof.

Rule 24(a)(2) of the Federal Rules of Civil Procedure provides as follows:

> "(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; * * *."

In clarifying the aforesaid Rule the following is stated in 4 Moore's Federal Procedure at pages 38, 39:

> "* * * Inadequacy of representation is shown * * * if the representative * * * fails because of non feasance in his duty of representation. * * *."

It is a cardinal principle of law that the Board of Directors of a corporation is the representative of its stockholders. It is the duty of the Board to protect and foster the interests of the corporation and its stockholders.

The Board of Consolidated, in failing and refusing to appeal from the aforesaid judgments, especially in view of the appellate court decision in *Steinberg v. Sharpe, supra,* was "non feasant" in its duty of representation. Appellant should, therefore, as a matter of right, have

been permitted to intervene for the purpose of appealing from the judgments.

The inadequacy of representation can further be demonstrated by the fact that since the three individual defendants-appellees herein were appointed as officers of Consolidated by its Board of Directors, this Board could hardly be expected to zealously prosecute any action against them.

This case is on all fours with *Park & Tilford, Inc. v. Schulte* (C. A. 2, 1947), 160 F. 2d 984, Cert. den., 332 U. S. 761. In that case *Park & Tilford, Inc.,* commenced an action under Section 16(b) of the Securities Exchange Act of 1934 to recover "short swing" profits realized by certain of its principal stockholders. Kogan, a stockholder of Park & Tilford, Inc., made a motion to intervene in the suit. The District Court denied this motion. Thereafter the District Court granted a judgment in favor of Park & Tilford, Inc., which Kogan deemed insufficient as a matter of law. Park & Tilford, Inc., refused to appeal from this judgment and Kogan thereupon appealed to the United States Court of Appeals from the District Court's order denying his motion to intervene.

The United States Court of Appeals, in reversing the order of the District Court and permitting Kogan to intervene for the purpose of appealing from the judgment, also decided Kogan's appeal from the judgment at the same time, stating (pp. 988, 989):

> "With reference to Kogan's application to intervene below, we think, as we have indicated in allowing her to intervene here, that the interests of minority shareholders were not adequately represented by

existing parties to the action. Under the circumstances here disclosed, the interests represented by defendants and their father were so dominant in the affairs of plaintiff that the District Court should have allowed stockholder representation to guard against even the appearance of any concerted action. As it turns out, plaintiff was at least ill-advised to concede the higher amount as the purchase price and to reduce its demand for judgment from an original $500,000 to the amount actually awarded below. But viewing this only as an error of judgment and disregarding Kogan's claims of a speculatively rigged market, *we still have an ample demonstration that the representation was inadequate and intervention should have been granted under Federal Rules of Civil Procedure, rule 24(a)(2), 28 U. S. C. A. following section 723c.* Mack v. Passaic Nat. Bank & Trust Co., 3 Cir., 150 F. 2d 474, 477; United States v. C. M. Lane Lifeboat Co. D. C. E. D. N. Y., 25 F. Supp. 410, affirmed 2 Cir., 118 F. 2d 793, appeal dismissed, C. M. Lane Lifeboat Co. v. United States, 314 U. S. 579, 62 S. Ct. 124, 86 L. Ed. 469; 2 Moore's Federal Practice, Sect. 24.07, page 2333. *This right may be protected by appeal to this Court.* United States v. Philips, 8 Cir., 107 F. 824; United States Trust Co. of New York v. Chicago Terminal Transfer R. Co., 7 Cir., 188 F. 292, 296; 2 Moore's Federal Practice, Sect. 24.06, page 2332. On remand the stockholder is entitled to ask for counsel fees payable out of the fund recovered. Smolowe v. Delendo Corporation, *supra,* 2 Cir., 136 F. 2d 231, 241.

"The order denying intervention to Kogan is reversed, the judgment is vacated, and the action is remanded to the District Court for the award of a judgment for $418,128.59 with interest and costs

against the defendants, together with an allowance of counsel fees from the fund recovered found appropriate by the Court. Costs in this Court will be taxed against the defendants." (Italics supplied.)

While appellant's interest is only derivative, it is no less real than a direct interest and will justify intervention. See *Bronson v. La Cross and M. R. Co.* (1864), 2 Wall. 283; *Klein v. Nu-Way Shoe Co.* (C. A. 2, 1943), 136 F. 2d 986; *Galconda Petroleum Corp. v. Petrol Corp.* (S. D. Cal., 1942), 46 Fed. Supp. 23.

In *Wolpe v. Poretsky* (C. A. D. C., 1944), 144 F. 2d 505, 508, cert. den. 323 U. S. 777, the Court stated:

"The application to intervene was timely. Intervention may be allowed after a final decree where it is necessary to preserve some right which cannot otherwise be protected. *Here at least one of the rights which cannot be protected without intervention is the right to appeal.* The Court was, therefore, in error in denying appellants leave to intervene *as a matter of right*" (Emphasis supplied.)

And in *United States Casualty Co. v. Taylor* (C. A. 4, 1933), 64 F. 2d 521, 527, the Court said:

"* * * Equity Rule 37 (28 U. S. C. Sect. 723) above quoted, declares that intervention may be permitted at any time, and the decisions show that it may be allowed after a final decree when it is necessary to do so to preserve some right which cannot otherwise be protected. United States v. Securities Co. (C. C.) 128 F. 808, 810; Cincinnati I. & W. R. Co. v. Indianapolis Union Ry. Co. (C. C. A.) 279 F. 356, 363."

It is respectfully submitted that the District Court's denial of appellant's motion to intervene in the actions was as effective to foreclose any right of appeal from its judgments as though no such rights ever existed. Yet, appellant and the other stockholders of Consolidated will be bound by these judgments.

The Supreme Court in *Brotherhood of Railroad Trainmen v. Baltimore & O. R. Co.* (1947), 331 U. S. 519, recognized the inviolate rights of appeal from judgments, when it stated at page 524:

> "* * * But where a statute *or the practical necessities* grant the applicant an absolute right to intervene, the order denying intervention becomes appealable. Then it may fairly be said that the applicant is adversely affected by the denial, there being no other way in which he can better assert the particular interest which warrants intervention in this instance. *And since he cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene, the order denying intervention has the degree of definiteness which supports an appeal therefrom.* See Missouri-Kansas Pipe Line Co. v. United States, 312 U. S. 502, 508, 85 L. Ed. 975, 981, 61 S. Ct. 666." (Emphasis supplied.)

And in *Dickinson v. Petroleum Conv. Corp.* (1950), 338 U. S. 507, 513, the Court held that "an order denying intervention to a person having an absolute right to intervene is final and appealable."

It is respectfully submitted that the District Court erred in denying appellant's motion to intervene in the actions for the purpose of appealing from its judgments.

POINT II.

The District Court Erred in Granting Judgments Against Consolidated Engineering Corporation and in Favor of Each of the Individual Defendants-Appellees Herein.

The incontrovertible facts show that, pursuant to option agreements, Consolidated granted each of the individual appellees herein the right to purchase 5,000 shares, respectively, of its common stock, in blocks of 1000 shares each, at $5.00 per share, during a period of five years, so long as he remained in the corporation's employ. [R. pp. 12, 21-25, 36, 44-48, 59, 69-73.]

Under each of the agreements, the option granted thereby became exercisable as to the first block one year from the date of the agreement, as to the second block two years from such date, as to the third block three years from such date, as to the fourth block four years from such date and as to the fifth block five years from such date. [R. pp. 22, 45, 70.]

Each of the individual appellees herein, while an officer of Consolidated, purchased shares of its common stock under his respective option agreement and, within a period of less than six months thereafter, sold shares of Consolidated common stock at a price in excess of the option price. [R. pp. 5, 12-15, 29, 36-39, 52, 59-64.]

Consolidated commenced suit against each of the individual appellees herein, pursuant to Section 16(b) of the Securities Exchange Act of 1934, to recover the profits realized as a result of their respective "short swing" transactions in its stock. [R. pp. 3-6, 27-30, 50-53.]

The District Court granted judgments in favor of each of the individual appellees herein, stating in its opinion [R. 80-81, 102 Fed. Supp. 112]:

> "There is no contention here that defendants in any way unfairly used information which they might have obtained as officers, directors or beneficial owners. * * * Inasmuch as option agreements had been given to sixteen employees, it would seem entirely unfair to impose a penalty upon the three defendants herein, when it is impossible to impose a like penalty upon the other key employees who did and performed the same acts as complained of in these actions but who did not happen to have conventional titles of 'corporation officials.'
>
> "The sole excuse for filing these actions was that defendants were 'officers' of the corporation. Defendant Bradburn was vice-president, in charge of engineering; defendant Nesbit was vice-president, in charge of production, and defendant Colvin was treasurer. Because the other employees who had similar option agreements did not happen to be officers or directors of the corporation, they could exercise their options to purchase, and sell with immunity. It would be extremely inequitable to penalize these three who held options and not similarly penalize the others. According to the section, its purpose is to 'prevent unfair use of information.' There is no imputation that these defendants or any of them unfairly used any information obtained through their relationship to plaintiff corporation."

It is respectfully submitted that recovery under Section 16(b) of the Securities Exchange Act of 1934 does not require any showing that the individual appellees actually

obtained information by reason of their inside position, or made unfair use of any information so obtained.

Thus in *Smolowe v. Delendo Corporation* (C. A. 2, 1943), 136 F. 2d 231, although it was conceded that defendant had made no use of inside information in his "short swing" transactions, the Court of Appeals affirmed the judgment of the District Court directing the defendant to pay back such profits to the corporation, stating (pp. 235, 236):

> "The controversy as to the construction of the statute involves both the matter of substantive liability and the method of computing 'such profit.' The first turns primarily upon the preamble, viz. 'For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer.' Defendants would make it the controlling grant and limitation of authority of the entire section, and liability would result only for profits from a proved unfair use of inside information. *We cannot agree with this interpretation.*
>
> * * * * * * * *
>
> "The primary purpose of the Securities Exchange Act—as the declaration of policy in Section 2, 15 U. S. C. A. Sect. 78b, makes plain—was to insure a fair and honest market, that is, one which would reflect on evaluation of securities in the light of all available and pertinent data. Furthermore, the Congressional hearings indicate that Section 16(b), specifically, was designed to protect the 'outside' stockholders against at least short-swing speculation by insiders with advance information. It is apparent too, from the language of Section 16(b) itself, as well as from the Congressional hearings, that the

only remedy which its framers deemed effective for this reform was the imposition of a liability based upon an objective measure of proof. This is graphically stated in the testimony of Mr. Corcoran, chief spokesman for the draftsmen and proponents of the Act, in Hearings before the Committee on Banking and Currency on S. 84, 72d Cong., 2d Sess., and S. 56 and S. 97, 73d Cong., 1st and 2d Sess., 1934, 6557: '*You hold the director, irrespective* of any intention or expectation to sell the security within six months after, because it will be absolutely impossible to prove the existence of such intention or expectation, and you have to have this crude rule of thumb, because you cannot undertake the burden of having to prove that the director intended, at the time he bought, to get out on a short swing.'

* * * * * * * *

"Had Congress intended that only profits from an actual misuse of inside information should be recoverable, it would have been simple enough to say so. Significantly, however, it makes recoverable the profit from any purchase and sale, or sale and purchase within the period. The failure to limit the recovery to profits gained from misuse of information justifies the conclusion that the preamble was inserted for other purposes than as a restriction on the scope of the act. * * *" (Emphasis supplied.)

And in *Gratz v. Claughton* (C. A. 2, 1951), 187 F. 2d 46, 50, cert. den., 341 U. S. 920, the Court of Appeals in affirming the District Court's judgment against the defendant, stated:

"* * * If only those persons were liable, who could be proved to have a bargaining advantage, the execution of the Statute would be so encum-

> bered as to defeat its whole purpose. We do not mean that the interest, of which a statute deprives an individual, may never be so vital that he must not be given a trial of his personal guilt; but that is not so when all that is at stake is a director's, officer's or 'beneficial owner's' privilege to add to, or subtract from, his holdings for a period of six months. In such situations it is well settled that a statute may provide any means which can reasonably be thought necessary to deal with the evil, *even though it may cover instances where it is not present.* * * *" (Emphasis supplied.)

The basis for the District Court in granting judgments in favor of the individual appellees herein is set forth in that Court's opinion [R. pp. 80-81], wherein it was stated that "it would seem entirely unfair" and "extremely inequitable to penalize these three" individual appellees because they "were 'officers' of the corporation" when "it is impossible to impose a like penalty upon other key employees" who were not officers or directors of the corporation but "had similar option agreements" and "could exercise their options to purchase, and sell with immunity."

It is respectfully submitted that the District Court apparently misconstrued the clear language in Section 16(b) of the Act and the legislative purpose and intent of Congress which enacted it.

The Act is wholly unconcerned with the fairness of any particular transaction. Its sole purpose is to deter any officer, director or "beneficial owner" of an issuer from transacting any purchases and sales or sales and purchases of the issuer's listed securities within a period of less than six months. The Act makes any profit realized by

them recoverable by the issuer "irrespective of any intention on the part of such beneficial owner, director or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months."

Nobody compels a person to become a director, officer or principal stockholder of a corporation. When he does become a member of such class he does so voluntarily and "he accepts whatever are the limitations, obligations and conditions attached to the position."

As the United States Court of Appeals for the Second Circuit stated in *Gratz v. Claughton, supra,* at page 49:

> "* * * The section forfeits the profits because it forbids dealings in the shares. Nobody is obliged to become a director, or officer, or a 'beneficial owner'; just as nobody is obliged to become the trustee of a private trust; but, as soon as he does so, he accepts whatever are the limitations, obligations and conditions attached to the position, and any default in fulfilling them is as much a 'violation' of law as though it were attended by the sanction of imprisonment. * * *"

The District Court further stated in its opinion [R. p. 81] that "under the circumstances as outlined, the corporation should now be estopped to recover profits of a transaction which the corporation itself initiated and set up and which it (at least inferentially) assured defendants was valid."

In *Park & Tilford, Inc. v. Schulte* (C. A. 2, 1947), 160 F. 2d 984, cert. den. 332 U. S. 761, the defendants also sought to avoid judgment under Section 16(b) of the Act by raising a similar argument. In that case,

the defendants owned preferred shares of stock of Park & Tilford, Inc., which were convertible into common shares of stock. The defendants converted their preferred shares into common shares and thereafter, within a period of less than six months, they sold their common shares of stock. The corporation commenced an action against them under Section 16(b) of the Securities Exchange Act of 1934 claiming that the conversion by the defendants of their preferred stock into common stock constituted a "purchase" within the meaning and intent of the Act. The defendants argued that the corporation should not be permitted to profit from its own action because they were forced to convert their preferred shares of stock by reason of a resolution passed by the corporation calling all the preferred stock for redemption by a certain date.

The United States Court of Appeals, in rejecting this argument and directing judgment against defendants, stated (p. 988):

> "* * * Indeed, the contention that defendants were forced to convert is somewhat absurd, in view of the fact that since defendants controlled plaintiff they could have prevented the passage of the redemption resolution or rescinded it after it had been passed."

It is inconceivable that the District Court could have reasonably inferred that the facts of this case constituted an estoppel on the part of Consolidated from collecting the profits realized by the individual appellees herein as a result of their respective "short swing" transactions in its stock.

While it is true that Consolidated agreed to sell its stock to appellees at a stipulated option price, it certainly did not compel them to sell such stock within the six-month period.

The purchases by appellees of stock under their respective option agreements with Consolidated, in and of themselves, gave rise to no liability under the Act. It was the purchases *followed by the sales* within the six-month period which completed the cycle and gave rise to liability under the Act.

Before the passage of the Securities Exchange Act of 1934, Congress had recognized that speculations of "insiders" in corporate stock had been a source of "outrageous scandal."

The reasons for enacting the Act are fully and clearly set forth in Section 2 thereof. In its purpose the "Act is aimed as an integrated entity toward the reform of the security markets by control of speculation *and protection of the public* against trading based on inside information and other abuses in the market machinery." (46 Yale L. J. 624, 629. See *Smolowe v. Delendo Corporation, supra.*)

The main purpose of the Act is to protect the *investing public* by insuring that the securities exchanges of this Country shall maintain free, fair and open markets for the buying and selling securities.

Aside from the facts submitted which certainly negative any "estoppel" on the part of Consolidated to re-

cover the "short swing" profits from the appellees herein, the Courts have invariably held that where a right is granted "in the public interest to effectuate legislative policy, waiver of a right so charged or colored with public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate." (*Brooklyn Savings Bank v. O'Neil* (1945), 324 U. S. 697, 704.)

Thus in *Brooklyn Savings Bank v. O'Neil, supra,* the Court said at page 704:

> "It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. *Midstate Horticultural Co. v. Pennsylvania R. Co.,* 320 U. S. 356, 361, 88 L. Ed. 96, 101, 64 S. Ct. 128; *A. J. Phillips Co. v. Grand Trunk Western R. Co.,* 236 U. S. 662, 667, 59 L. Ed. 774, 776, 35 S. Ct. 444. *Cf. Young v. Higbee Co.,* 324 U. S. 204, *ante,* 890, 65 S. Ct. 594, 57 Am. Bankr. Rep. (N. S.) 730. Where a private right is granted in the public interest to effectuate legislative policy, waiver of a right so charged or colored with public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate. * * *"

And in *Park & Tilford, Inc. v. Schulte, supra,* the United States Court of Appeals held that estoppel would not be tolerated nor allowed in an action brought under

Section 16(b) of the Securities Exchange Act of 1934. Thus in Footnote 1, on page 989, the Court said:

> "To the contentions that both Kogan and the Commission are estopped by previous positions taken, we think the answer clear that, as the former acts as fiduciary for other stockholders, the latter as representative of the public, no estoppel is permissible. Compare Federal Rules of Civil Procedure, rule 24(c), 28 U. S. C. A., following section 723c; *Young v. Higbee Co.,* 324 U. S. 204, 65 S. Ct. 594, 89 L. Ed. 890. * * *"

Finally, the District Court in its opinion [R p. 83] stated that "The hard rule of law might indicate that judgment should be rendered in favor of plaintiffs, but equity dictates that judgment should be in favor of the defendants herein."

It is respectfully submitted that in *Steinberg v. Sharpe* (C. A. 2), 190 F. 2d 82, the United States Court of Appeals for the Second Circuit had before it a case on all fours with the case at Bar involving the identical issues set forth in the present appeal.

In the *Steinberg* case, *supra,* the corporation, as here, granted options to "certain of its key personnel" to purchase shares of its stock at certain stipulated prices.

Shares of the corporation's stock were purchased by one Reuscher, an officer of the corporation, pursuant to two option agreements. The first agreement granted Reuscher the right to purchase 1600 shares at $8.75 per share in four blocks of 400 shares each. The second

agreement granted Reuscher the right to purchase 900 shares at $13.38 per share in four blocks of 225 shares each. Under each agreement, the option granted thereby became exercisable as to the first block one year from the date of the agreement, as to the second block two years from such date, as to the third block three years from such date and as to the fourth block also three years from such date but on condition that he had not theretofore sold any shares previously purchased by him under such agreement. Under each agreement, all rights expired four years after the date of the agreement. The options could be exercised by Reuscher only during the four-year period and only while he was in the corporation's employ or within a thirty-day period thereafter.

Within six months after Reuscher had purchased the shares of stock under his option agreements, he sold the shares of stock at a price in excess of the option price which he had paid therefor.

Suit was commenced under Section 16(b) of the Securities Exchange Act of 1934 to recover the profits realized by him as a result of his short swing transactions aforesaid.

The District Court, per Medina J. (now a Judge of the United States Court of Appeals for the Second Circuit), granted a judgment for the plaintiff directing the defendant, Reuscher to pay back his "short swing" profits to the corporation. In a well-reasoned opinion the District Court laid down the rule for determining the *cost* of the

shares of stock purchased under such option agreements, as follows (95 Fed. Supp. 32, 34):

> "Nevertheless, in determining the cost of the securities, the reasoning of the *Truncale v. Blumberg, supra,* would seem to require the inclusion of so much of the value of the option as represented long-term increment, to which the defendant was entitled pursuant to the option agreements by virtue of his continued services to the corporation.
>
> "This may be accomplished by holding the cost of the security to be the exercise price of the option plus the value of the option *on the day that it accrued* as fixed by the employment agreement under the terms of which it accrued. The latter figure will represent the amount of compensation which the corporation paid the defendant pursuant to its agreement, just as it did in the *Truncale* case. Adoption of this rule will preclude the type of evasion of the provisions of Section 16(b) described above."

The United States Court of Appeals for the Second Circuit, in affirming the judgment of the District Court, stated (190 F. 2d 82):

> "Judgment affirmed *on opinion below* 95 F. Supp. 32."

It is respectfully submitted that the District Court erred in failing to follow the principles of law set forth in the case of *Steinberg v. Sharpe, supra;* it should have entered judgments in favor of plaintiff and against appellees.

POINT III.

The Final Order of the District Court Denying Appellant, Pellegrino, the Right to Intervene for the Purpose of Appealing From Its Judgments Against Consolidated Should Be Reversed and Appellant's Motion to Intervene Should Be Granted, With Costs, and the Judgments of the District Court in Favor of Each of the Individual Appellees Herein Should Be Reversed and the Cases Should Be Remanded to the District Court Directing It to Enter Judgments in Favor of Consolidated Engineering Corporation and Against Appellees, William D. Nesbit, Hugh F. Colvin and James R. Bradburn.

Respectfully submitted,

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By ROBERT W. KENNY,
Attorneys for Appellant, Pellegrino.

MORRIS J. LEVY,
Of Counsel.

No. 13220

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARMELO J. PELLEGRINO,

Appellant,

vs.

WILLIAM D. NESBIT, HUGH F. COLVIN, JAMES R. BRADBURN, and CONSOLIDATED ENGINEERING CORPORATION,

Appellees.

BRIEF OF CONSOLIDATED ENGINEERING CORPORATION, APPELLEE.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

Cases

Statutes

No. 13220

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Appellees.

BRIEF OF CONSOLIDATED ENGINEERING CORPORATION, APPELLEE.

Jurisdiction.

The complaints herein, filed on November 21, 1950, set forth the facts showing the existence of the jurisdiction of the District Court. [R. pp. 3, 28, 51.] Jurisdiction of the District Court is derived from Section 27 of the Securities Exchange Act of 1934, 15 U. S. C. A., Section 78aa. Jurisdiction of the Court of Appeals is derived from the Judicial Code, 28 U. S. C. A., Sections 1291, 1294.

Statement.

Appellant, Pellegrino, has appealed from an order of the District Court of the United States, Southern District of California, Central Division, entered November 29, 1951, denying his motion for leave to intervene for the

purpose of appealing from judgments entered October 30, 1951, in favor of the named individual appellees herein. [R. pp. 117-118.] In support of his appeal appellant has filed an Opening Brief in which he has made allegations and drawn inferences with respect to his "right" to appeal. As a result Consolidated Engineering Corporation, the plaintiff below and one of the appellees herein, hereinafter sometimes referred to as "Consolidated," feels impelled to file this Brief.

Consolidated will direct its attention solely to one issue, and particularly to appellant's conclusions thereon, the same issue, differently phrased, having been presented and argued by appellant in his Opening Brief (pp. 3-10).

Issue Presented.

Was appellant's interest adequately represented by Consolidated?

Argument.

INTRODUCTORY.

Consolidated does not propose to argue herein the merits of the judgments entered by the District Court in these actions, nor does it propose to argue the question of whether said judgments, on their merits, are properly before the Court of Appeals, nor does it propose to argue whether appellant's motion to intervene was a timely one. However, Consolidated does dispute the contention of appellant that his interests, and, indeed, of all of Consolidated stockholders, have not been adequately represented throughout. Appellant's contention that he is entitled to intervene and prosecute appeals from the judgments below *as a matter of right,* because his

interest was inadequately represented by Consolidated, is without support. It is based on inferences and conclusions wholly unsupported in fact or in law, and particularly unsupported by the Record on Appeal. This Court should not be called upon to make findings on the basis of such unsupported inferences and conclusions.

I.

The Interests of Consolidated, and Its Stockholders, Were Adequately Represented by Consolidated in the District Court.

Rule 24(a)(2) of the Federal Rules of Civil Procedure provides that:

> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; * * *."

Appellant asserts a right to intervene derived from the above Rule (App. Op. Br. pp. 6, 7). However, he has failed to establish one of the requisites for the application of that Rule, namely, that "the representation of the applicant's interest by existing parties is or may be inadequate." Such inadequacy must be shown to exist before intervention is authorized. (*MacDonald v. United States,* 119 F. 2d 821 (9th Cir., 1941).)

Appellant suggests in his Brief (p. 7) that the Board of Directors of Consolidated "could hardly be expected to zealously prosecute any action" against the defendants herein because they were appointed as officers of the corporation by the Board. This is a patent *non sequitur.*

As appellant's Brief (p. 6) points out, it is a "cardinal principle of law that the Board of Directors of a corporation is the representative of its stockholders. It is the duty of the Board to protect and foster the interests of the corporation and its stockholders." As a consequence, when a Board of Directors employs an officer in a position of responsibility, the logical conclusion (contrary to that urged by appellant) is that the Board will hold that officer strictly accountable for all of his actions concerning the corporation and its affairs.

To be sure, if the employee controls or dominates the Board of Directors, a different conclusion might be justified. Perhaps with this thought in mind, appellant has cited in his Brief (p. 7), *Park & Tilford, Inc. v. Schulte,* 160 F. 2d 984 (2nd Cir., 1947), cert. denied, 332 U. S. 761, 68 Sup. Ct. 64 (1947), as a case "on all fours" with the present one. However, the vital facts in that case are clearly different from those herein. They point up the distinction between representation of a stockholder's interest by the corporation when the defendant controls or dominates it and when he does not. Here there was no such control or domination.

In the *Park & Tilford* case, *supra,* the District Court's order denying the stockholder's motion to intervene in an action to recover, under Section 16(b) of the Securities Exchange Act of 1934 (15 U. S. C. A., Sec. 78p(b)),* "short swing" profits realized by certain principal stockholders was reversed on appeal by the Court of Appeals for the Second Circuit. That Court emphasized the dominance exercised by the defendants and their father,

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*See *infra,* page 7.

and the interests which they represented, over Park & Tilford. The defendants in that case were brothers who were trustees for a trust created by their father. He, in turn, was a former president of Park & Tilford, and was chairman of its Board of Directors in 1945, which was between the time of the purchases and sales by the defendants giving rise to the litigation and the time the Court of Appeals reversed the denial of the stockholder's motion to intervene. In addition, and more important, the defendants themselves controlled the corporation through ownership of a majority of the common voting stock. They also owned a sizeable block of preferred stock, convertible into common stock. Such facts (obviously different from those in the present case) virtually compelled the conclusion which was reached.

By way of contrast, examination of the Record on Appeal in this litigation discloses no suggestion of concerted action. There is nothing which shows dominance or control of Consolidated by the defendants. There is nothing even remotely suggesting that Consolidated's Board of Directors, responsible as it was and is to its stockholders, has failed or would fail to protect, in every way, the best *and the real* interests of Consolidated and its stockholders.

Between March 1, 1949, and April 20, 1950, Consolidated had at least 174,190 shares of stock outstanding, of which, during the same period, Nesbit and his wife owned no more than 2,000 shares. [R. p. 19.] Between March 25, 1949, and August 9, 1950, Consolidated had at least 176,790 shares of stock outstanding, of which, during the same period, Colvin and his wife owned no more than 1,420 shares. [R. p. 42.] Be-

tween March 24, 1949, and April 25, 1950, Consolidated had at least 176,790 shares of stock outstanding, of which, during the same period, Bradburn and his wife owned no more than 2,100 shares. [R. p. 67.] Thus, the combined stock holdings of Nesbit, Bradburn, and Colvin, and their wives, during the periods when the purchases and sales giving rise to this litigation were made, constituted less than 4% of the total outstanding stock of Consolidated. There is no evidence in the record, by affidavit of appellant, or otherwise, that the proportionate interests of those individuals, or their wives, have changed since the above mentioned dates. Neither is there any showing of control or dominance of the affairs of Consolidated.

During the time of the transactions here involved Nesbit and Bradburn were vice-presidents [R. pp. 4, 51], and Colvin was the treasurer of Consolidated. [R. p. 28.] However, there is no evidence in the record, by affidavit of appellant, or otherwise, that these officers, or any of them, made or influenced any decisions involving corporate policy such as those made by Consolidated's Board of Directors in initiating these actions, prosecuting them diligently to judgment, and deciding not to appeal. Neither is there any showing that any of the three, nor all three together, had such power. There is no evidence in the record that these officers, nor any one of them, were members of the Board of Directors of the corporation at any material time, nor at any time, nor in any way related to or affiliated with any members of said Board. Had any domination of the Board of Directors by the three defendants existed (which, of course, it did not in fact) it is the appellant's respon-

sibility to bring before this Court a record so demonstrating.

It is abundantly clear that this case is not on all fours with the *Park & Tilford* case, *supra*. The present case is so distinguishable on its facts as to make the *Park & Tilford* case no authority whatsoever for appellant's contention.

It should be noted in passing that the Securities and Exchange Commission appeared below as a friend of the Court [R. p. 85] and assisted Consolidated in representing its interests and those of its stockholders. Yet no suggestion has been made by the Commission that Consolidated failed to discharge its function adequately.

II.

Consolidated's Board of Directors Acted in the Best Interests of, and Adequately Represented, the Corporation and Its Stockholders by Deciding in Good Faith Not to Appeal From the Judgments of the District Court.

Section 16(b) of the Securities Exchange Act of 1934, 15 U. S. C. A., Section 78p(b) provides:

> "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the

part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or *shall fail diligently to prosecute the same thereafter*; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection." (Emphasis added.)

This section confers a right upon a stockholder to institute suit on the corporation's behalf to recover "short swing" profits, provided that the corporation fails to commence such suit within sixty days after request or *fails diligently to prosecute the same thereafter.*

As already stated herein, appellant has failed completely to show a failure of Consolidated to adequately represent the interests of its stockholders in prosecuting the suits against the defendants herein to judgment. Such prosecution was diligent notwithstanding that it resulted in judgments for the three defendants. But appellant urges that Consolidated must appeal the judgments or be deemed "non-feasant" in its duty. (App. Op. Br. p. 6.)

Appellant seeks to usurp the function of the Board of Directors. A corporation's Board of Directors is required by law to exercise its best judgment in directing corporate affairs. Surely one of its functions is to decide whether to appeal from judgments in favor of defendants against whom the corporation has brought suit. Consolidated was well aware of the mandate in the Securities Exchange Act, Section 16(b), *supra,* to institute suits against the defendants and thereafter prosecute them diligently. This Consolidated has done, and judgments have been entered. However, it is an entirely different proposition that the appellant now urges. He contends that Consolidated must appeal from the judgments whether or not the Board of Directors determines, in good faith, that it would not be to the best interests of the corporation and its stockholders to do so; whether or not any evidence of collusion exists or existed before the trial court; and whether or not dominance, control or influence by the defendants of the decision of the Board of Directors not to appeal existed, exists, or was a possibility. This must be appellant's contention, although he has not stated it in so many words, because there is no evidence in the record, by affidavit, or otherwise, which even suggests a failure of Consolidated's Board of Directors to determine, in good faith, that an appeal would not be to the best interests of the corporation and its stockholders. Neither is there anything which even suggests the existence of concerted action in the proceedings before the District Court, or dominance, control or influence by the defendants of the decisions of the Board of Directors.

Appellant cites several cases. At page 9 of his Opening Brief he refers to *Wolpe v. Poretsky,* 144 F. 2d 505,

508 (C. A. D. C. 1944), cert. denied, 323 U. S. 777, 65 Sup. Ct. 190 (1944), in which case intervention was allowed after a final decree for the purpose of permitting an appeal. In that case adjoining property owners were permitted to intervene to take an appeal from a decision that a zoning order of a Zoning Commission was arbitrary, capricious and void. The Court stated at page 508:

> "We only indicate that there is enough in the record to show that in refusing to take an appeal the Commission did not adequately represent the intervener's interests."

However, the Court also said at page 507 (a statement conveniently omitted from the reference to the case in App. Op. Br.),

> "We do not go so far as to hold that adequate representation requires an appeal in every case."

There is nothing in the record here to indicate that Consolidated's failure to take an appeal constituted inadequate representation of the stockholders' interests.

Other cases cited in Appellant's Opening Brief with respect to the duty to appeal from judgments deserve only passing comment. In *Brotherhood of Railroad Trainmen v. Baltimore & O. R. Co., et al.,* 331 U. S. 519. 67 Sup. Ct. 1387 (1947), a statute gave the right to intervene; and the Court did not decide the issue on the basis of Rule 24(a)(2) of the Federal Rules of Civil Procedure. In *Klein v. Nu-Way Shoe Co.,* 136 F. 2d 986 (2nd Cir., 1943), collusion was alleged between a bankrupt and the creditors with the result that the stockholder was permitted to intervene. As previously

pointed out, there is no evidence of the existence of, nor the possibility of, collusion in this litigation. In *Missouri-Kansas Pipe Line Co. v. United States,* 312 U. S. 502, 61 Sup. Ct. 66 (1941), the stockholder's motion made appropriate allegations as to the unwillingness of those responsible for the actions of the corporation to protect its interests. No such allegations have been made, nor could justifiably be made, herein.

The reasons which could motivate a Board of Directors to decide, in good faith and in the best interests of the corporation and its stockholders, not to appeal from judgments of the nature herein involved are myriad. To enumerate a few: (1) the additional expense and time involved; (2) the uncertainty of success on appeal; (3) the effect of further harassment of the defendant employees upon not only those employees but all employees of the corporation, and the consequent effect upon the production, business, and welfare of the corporation; (4) the unfavorable reaction of the stockholders of the corporation in general, including stockholders with large as well as small holdings. These motives or similar ones, must be ascribed to the action of Consolidated's Board of Directors since appellant has failed completely to show the contrary by affidavit or otherwise.

Consolidated does not propose to argue whether the appellant's interest is "substantial" as he states in his Opening Brief (p. 6), or to argue whether the substantiality of his interest is material to a determination of his right to intervene. However, it should be ob-

served that appellant's interest in Consolidated was acquired only twenty-one (21) days before he requested the institution of these actions [R. pp. 112-113], and at the time of his motion to intervene his interest was limited to the ownership of *two shares of stock.* [R. p. 113.] As far back as March, 1949, Consolidated had a minimum of 174,190 shares outstanding. [R. p. 19.] Appellant must be speaking of some interest other than his stock ownership, for certainly that interest is not substantial. Whether it is a purely personal interest, or possibly that of his counsel, is in the realm of conjecture—a realm with which this Court should not be concerned. Be that as it may, it is submitted that Consolidated and its Board of Directors have adequately represented the interests of the corporation and all of its stockholders throughout this litigation, including the decision not to appeal the judgments herein. It is further submitted that Rule 24(a)(2) of the Federal Rules of Civil Procedure, *supra,* with respect to the right of intervention when applied to this situation refers solely to representation of applicant's interest *as a stockholder* in the corporation, and not to any interest applicant may have in personal gain separate and apart from a proportionate interest based on his stock ownership in any corporate recovery.

Consolidated urges that this Court recognize the fact that it has complied with the mandate of Section 16(b) of the Securities Exchange Act that suits be instituted and diligently prosecuted. Consolidated further urges

that this Court recognize that after such prosecution, the policy of the statute and principles of equity and justice not only permit but demand that the Board of Directors of the corporation shall, in good faith, have the discretion to determine whether or not an appeal should be taken. To find otherwise would mean that any stockholder, no matter how small his interest, could usurp the function of the directorate of a corporation elected by the majority of its owners, the stockholders.

Conclusion.

Appellant's interest was adequately represented by Consolidated.

Respectfully submitted,

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No. 13,220

IN THE

United States Court of Appeals

For the Ninth Circuit

CARMELO J. PELLEGRINO,
Appellant,

vs.

WILLIAM D. NESBIT, HUGH F. COLVIN, JAMES R. BRADBURN and CONSOLIDATED ENGINEERING CORPORATION,
Appellees.

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE.

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Topical Index

Table of Authorities Cited

Statutes

Miscellaneous

No. 13,220

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Appellees.

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE.

STATEMENT.

This is an appeal from a final order of the District Court of the United States for the Southern District of California, entered November 29, 1951, in which the court denied the motion of the appellant for leave to intervene in a suit brought pursuant to Section 16(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78p(b)). Exclusive jurisdiction over such actions is conferred upon the district court by Section 27 of the Securities Exchange Act (15 U.S.C. 78aa). The Commission, as the agency of the Government

charged by the Congress with the administration of that Act, files this memorandum as *amicus curiae,* with the Court's permission, in order to inform the Court of its views upon the issues of construction of the Act raised by the pleadings. The Commission likewise participated as *amicus curiae* below.

FACTS.

Carmelo J. Pellegrino is a minority stockholder of Consolidated Engineering Corporation. On October 2, 1950, he requested the company to institute an action pursuant to Section 16(b) of the Securities Exchange Act[1] against William D. Nesbit, Hugh F. Col-

[1]Section 16(b) provides:

"For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

vin and James R. Bradburn, officers of the company, in order to recover profits realized by them from purchases and sales of the company's securities within a six-month period.

Prompted by this request, the company filed a complaint against each of these officers (R. 3, 27, 50). Similar answers filed by each of the defendants raised, *inter alia,* the defense that the corporation was estopped to bring the action because the purchases had been made under option agreements entered into between the corporation and the defendants. It was alleged that the defendants had made their purchases and sales "in reliance upon plaintiff's assurance that plaintiff claimed no interest in any profits arising from said transactions" (R. 10, 34, 58).

A pre-trial stipulation was filed in each case in which it was agreed that the option agreements were part of a series of such agreements between the plaintiff and 16 key employees, granted to the employees in order to encourage them to remain in the employ of the plaintiff at a salary the plaintiff was able to pay. When the agreements, which provided for the purchase of the stock at $5 per share, were executed, the market price of the stock was less than $5. The sales, however, were made at prices substantially higher.

Following the pre-trial stipulation, the court below heard argument upon the issues of law, the three actions being consolidated. It then ruled that the corporation was estopped "to recover profits of a

transaction which the corporation itself initiated and set up and which it (at least inferentially) assured defendants was valid" (R. 81). Judgment was entered in favor of the defendants.

The company decided not to take any appeal in any of the three cases. Pellegrino, therefore, applied to the court below for leave to intervene in order to appeal in behalf of the company. The court below denied this application. This appeal is taken from that order of denial.

QUESTION INVOLVED.

Did the court below err in denying timely application by the appellant for leave to intervene for the purpose of taking appeals from judgments of the District Court in favor of officers of the corporation in actions brought by the corporation pursuant to Section 16(b) of the Securities Exchange Act, where it appeared that the corporation had decided not to appeal from the judgments despite the existence of substantial issues of law?

ARGUMENT.

Section 16(b) was adopted after an extensive Congressional investigation which disclosed repeated instances in which insiders took advantage of confidential information by trading upon it prior to its

public disclosures.[2] In order to discourage such activities the section provides that all profits realized from such trading shall inure to the corporation. As the instrument to enforce this statutory policy, the Congress selected the corporation itself. However, in recognition of the reluctance some corporations might feel toward assuming the obligation to bring an action against their own directors, officers and large stockholders, it is provided that if the corporation refuses to bring the action "or shall fail diligently to prosecute the same" any security holder may undertake it.

Thus the section itself provides for participation by security holders when the corporation falters in the prosecution of an action. Consolidated Engineering Corporation, after being advised by the plaintiff herein of the liability of the defendants and, presumably, being aware of his readiness to institute the actions if the corporation did not, initiated the proceedings. However, it abandoned them when adverse decisions were rendered by the District Court.

It is clear from the opinion rendered by the District Court—if not from the very participation of the Commission as *amicus curiae*—that the issues resolved by that court were substantial. Indeed, the District Court's rulings in these cases represented the first instance in which any court has held a corporation to be estopped from enforcing the sanctions imposed upon insiders who have traded in their company's

[2]See Report No. 1455 of the Senate Committee on Banking and Currency, 73d Cong., 2d Sess. (1934) 55-68. On Section 16(b) in general, see Loss, *Securities Regulation* (1951) 561-98.

securities, and another District Court has since come out the other way as we shall see in a moment.

The opinion is based, primarily, upon the absence of any proof that there had been any improper use of inside information, and upon what the court labelled an "inequity" in the statute if defendants should be held liable despite the non-liability of the other 13 employees who received the benefits of the option agreements but who were not officers, directors or large stockholders (R. 89, 98, 106).[3]

As one of the draftsmen of the Act testified during the hearings preceding its adoption, Section 16(b) is designed to reach profits realized by insiders as a result of short-term trading "irrespective of any intention or expectation to sell the security within six months," for it is "absolutely impossible to prove the existence of such intention or expectation, and you have to have this crude rule of thumb, because you cannot undertake the burden of having to prove that the director intended, at the time he bought, to get out on a short swing."[4] The section itself provides that the liabilities thereunder shall be imposed "irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not

[3]Although the section specifically refers to actions "at law or in equity" to enforce its provisions, the court chose to consider the action "an equitable proceeding," mistakenly assuming that the Commission so considered it, and applied "equitable doctrines coextensive with the common law" to modify the "hard rule of law" it felt might otherwise be indicated by the statute (R. 83).

[4]Hearings before the Senate Committee on Banking and Currency on S. 84, 73rd Cong., 1st Sess. (1934) 6557.

repurchasing the security sold for a period exceeding six months."

Under this provision it has never been deemed relevant to inquire into the mental state of the insider in those cases which have imposed liability, and proof of injury to either the security holders of the corporation or the corporation is not an element of the action. *Smolowe v. Delendo Corp.,* 136 F. 2d 231 (C.A. 2), cert. denied, 320 U.S. 751; *Park & Tilford, Inc. v. Schulte,* 160 F. 2d 984 (C.A. 2), cert. denied, 332 U.S. 761; *Gratz v. Claughton,* 187 F. 2d 46 (C.A. 2), cert. denied, 341 U.S. 920. In a sense, this is but the specific application of the time-honored doctrine that a trustee may engage in no activity which may, by even a remote possibility, involve a conflict of interest between his official duty and his private interest. *Michaud v. Girod,* 4 How. 503, 559; *Magrueder v. Drury,* 235 U.S. 106; *Pepper v. Litton,* 308 U.S. 295. At any rate, the intent and command of the Congress require liability to be imposed regardless of the presence or the absence of good faith, and in spite of any feeling held by the District Court with regard to the ultimate equities of the situation.

The existence of other optionees who do not belong to the class of persons the Congress has restricted in Section 16(b) offers little basis for so construing the section as to remove the three "insiders" from the scope of the section. The classification of insiders as persons who would be likely to have access to inside information appears to be not only reasonable, but

fully accepted by the common law of fiduciary responsibility.[5]

But, even if it be assumed that some affirmative representation by the corporation or its directors or officers may be implied to the effect that Nesbit, Colvin and Bradburn would be free immediately to sell the shares acquired by them pursuant to the option, such a representation could not affect their liabilities under the Act.

The corporation and its security holders are but instruments to vindicate the statutory policy against short-term trading by insiders. There is no necessary relationship between any loss suffered by the corporation by virtue of the trading and the amount of the recovery.[6] The section simply seeks to discourage insiders from short-term trading by forcing them to give up any profits realized from such activities. Clearly, the legislative purpose would be thwarted if the corporation could waive or estop itself by some action. Indeed, even if every security holder expressly waived his right of action under the section, we do not believe one of them would be precluded from later disavowing his waiver and bringing the action. Certainly in the absence of a unanimous waiver by all security holders there can be no bar.

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[5]See *Gratz v. Claughton,* 187 F. 2d 146 (C.A. 2), cert. denied, 341 U.S. 920.

[6]*Cf. In the Matter of William F. Davis, Jr.,* 17 T.C. 59 and *In the Matter of William L. Dempsey,* 17 T.C. (Sept. 28, 1951), where the Tax Court considered the payment to the corporation in the nature of a penalty to enforce the statutory policy. *Cf.* also *Brophy v. Cities Service Co.,* 70 A. 2d 5 (Del. Ch.).

This is all the more clear in view of Section 29(a) of the Act (15 U.S.C. 78cc(a)), which specifically provides:

> "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title shall be void."

Since the corporation could not be estopped by an express waiver, an implied waiver should likewise be void.[7] The non-waiver provision of Section 29(a) is applicable to the Act as a whole, but it is particularly appropriate in the context of the liability imposed by Section 16(b), for in such actions the management may be in substance both plaintiff and defendant. This was recognized in the recent decision of the District Court for the Southern District of New York in *Blau v. Hodgkinson,* 100 F. Supp. 361, where it was held that even an agreement of settlement of a Section 16(b) claim executed by the corporation

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[7] *Cf. Kaiser Frazer Corp. v. Otis & Co.,* ..... F. 2d ..... (C.A. 2, Apr. 7, 1952), in which the court stated, with reference to a similar no-waiver provision in the Securities Act:

> "But whatever the rules of estoppel or waiver may be in the case of an ordinary contract of sale, nevertheless it is clear that a contract which violates the laws of the United States and contravenes the public policy as expressed in those laws is unenforceable. Further support for our holding may be found in § 14 of the Act of 1933, 15 U.S.C.A. § 77n, which provides as follows: 'Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.' The broad language of this section may be construed to brush aside ordinary contract principles of estoppel and waiver that might otherwise apply to contracts for securities, including underwriting agreements."

and the officer who did the trading did not bar a subsequent suit upon the same cause of action.

The District Court for the Eastern District of Louisiana, in an opinion rendered April 2, 1952, was presented with a similar issue. It was there argued, as in the case at bar, that the action of the corporation in granting one of its officers an option to buy stock estopped it from suing the officer to recover his profits from subsequent sales under Section 16(b). The court held:

> "This argument ignores the fact that it is not the exercise of the option which is penalized under Section 16(b). If this defendant had not sold stock of his corporation within six months after he acquired the option stock then of course Section 16(b) would not apply. Defendant further argues, however, that when the corporation voted defendant the option to acquire the stock it was intended that he sell on the short swing in order that he might make a profit and thereby be compensated for meritorious service to the corporation. Consequently, so the argument goes, the corporation cannot now demand the profits from transactions it implicitly approved.
>
> "This argument misconceives the purpose of Section 16(b). Section 16(b) became law following a Congressional investigation which showed unhealthy, if not unconscionable, dealings between officers and directors of a corporation and the corporation itself, some of which dealings involved options from the corporation to the officers and directors. One of the purposes of Section 16(b) was to prevent these questionable transactions

between insiders among themselves to the possible detriment of the minority shareholders and the public in general. It is true that Section 16(b) makes short-term profits by officers and directors inure to the corporation and provides that the corporation shall institute proper proceedings to claim these profits. The bringing of such suit by the corporation, however, cannot work out an estoppel. The statute directs the corporation to bring the suit and, realizing that corporations where insiders deal in its stock on the short swing are very often under the control of those insiders and consequently may be loath to bring such suits or having brought them to prosecute them actively, provides further that any shareholder may bring the suit in the name of the corporation where the corporation has not acted. The courts, also as a protective measure, have allowed shareholders to intervene freely where the corporation has brought suit pursuant to Section 16(b). Park & Tilford v. Schulte, 160 F. 2d 984 (CCA-2-1947). In other words, in order to protect minority shareholders and the public who have no control over the management of the corporation, Section 16(b) uses the corporation as an instrument, sometimes an unwilling instrument, by which the officer or director is forced to disgorge his short term profits. Under such circumstances there can be no estoppel." *Jefferson Lake Sulphur Co. v. Walet,* ..... F. Supp. ..... (E.D. La., Apr. 2, 1952).

It is, of course, a legitimate management function to determine whether or not an action should be further pursued by an appeal. But the decision taken is subject, in actions brought pursuant to Section

16(b), to the statutory admonition that if the management fails diligently to prosecute a claim any security holder may undertake it. Here management expressly declined to take an appeal, although important and novel questions of law were involved. Certainly management's decision constituted a failure to prosecute diligently within the meaning of the section, and any security holder should have been permitted to assume the responsibility for carrying the litigation forward.[8]

Even if we assume the utmost good faith on the part of management in reaching its decision not to continue the prosecution, it would manifestly permit ready evasion of statutory safeguards against complete control by corporate management of suits against other members of management pursuant to Section 16(b) if the corporate management could thus preclude security holder action.

Hitherto the courts have freely granted to security holders the right to intervene in Section 16(b) actions—both by virtue of the section itself, which, as we have shown, contemplates a liberal grant of this right, and by virtue of Rule 24(a)(2) of the Federal Rules of Civil Procedure, which allows intervention as a matter of right whenever "the representation of applicants' interest by existing parties is or may be

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[8]See *Young v. Higbee Co.*, 325 U.S. 204, where the Court emphasized the fiduciary nature of the relationship between the appellants and the class they presumed to represent, and denied to the appellants, who had sold their interest in the corporation which was the subject of the appeal and withdrawn their appeal, the fruit of their sale.

inadequate."[9] The Court of Appeals for the Second Circuit, in reversing an order which denied a stockholder's application to intervene in an action brought pursuant to Section 16(b) by the corporation, pointed out that stockholder participation in such actions should be welcomed "to guard against even the appearance of any concerted action." It was pointed out, further, that unless such participation was allowed "the interests of minority security holders [might not be] adequately represented."[10]

Indeed, merely the existence of important and novel questions of law, when the facts are undisputed, raises sufficient doubt of the adequacy of the representation of the minority stockholders to justify intervention. *Twentieth Century-Fox Film Corp. v. Jenkins,* 7 F.R.D. 197 (S.D. N.Y.).

It has even been held that a security holder should be permitted to intervene in a Section 16(b) action although "the case . . . presently appears to present no real issues." *Berkey & Gay Furniture Co. v. Wigmore,* CCH Fed. Sec. L. Serv. par. 90,376 (S.D. N.Y.).

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[9]This rule has consistently been construed to permit intervention freely. See *e.g., U.S. v. C.N. Lifeboat Co., Inc.,* 25 F. Supp. 410 (E.D. N.Y.), affirmed, 118 F. 2d 793 (C.A. 2), appeal dismissed, 314 U.S. 579, where it was held that the petitioner's representation was inadequate because he was not on friendly terms with the attorney for the defendant, who presumed to be representing his interest; *Plye-National Co. v. Amos,* 172 F. 2d 425 (C.A. 7), where a stockholder was permitted to intervene in a suit by the corporation against former officers of the corporation.

[10]*Park & Tilford v. Schulte,* 160 F. 2d 984, 988 (C.A. 2).

The many opportunities for less than vigorous prosecution in the course of litigation, the amicable nature of many section 16(b) claims by a corporation against its own "insiders," the conflict of interests in some such cases which it is difficult to show, and the public interest in the enforcement of the sanctions require free intervention by minority interests. "No possible prejudice can result from the intervention, whereas the same may be beneficial to the corporation and its stockholders."[11]

CONCLUSION.

For the reasons stated, we believe the order of the court below denying the appellant the right to intervene should be reversed.

Dated, May 9, 1952.

Respectfully submitted,

LOUIS LOSS,
Associate General Counsel,

MYER FELDMAN,
Attorney,

Securities and Exchange Commission.

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[11] *American Distilling Co. v. Brown*, 112 N.Y.L.J. 261 (Sup. Ct. 1944).

No. 13220.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARMELO J. PELLEGRINO,

Appellant,

vs.

WILLIAM D. NESBIT, HUGH F. COLVIN, JAMES R. BRADBURN and CONSOLIDATED ENGINEERING COMPANY,

Appellees.

BRIEF OF APPELLEES WILLIAM D. NESBIT, HUGH F. COLVIN AND JAMES R. BRADBURN.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES PAGE

STATUTES

PAGE

TEXTBOOKS

No. 13220.

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BRIEF OF APPELLEES WILLIAM D. NESBIT, HUGH F. COLVIN AND JAMES R. BRADBURN.

I.
STATEMENT OF THE CASE.

This appeal is from an order of the District Court of the United States for the Southern District of California, Central Division, made and entered on November 29, 1951, denying the motion of appellant, Carmelo J. Pellegrino, for permission to intervene, after judgment, in three actions. [Tr. of R. p. 118.]

On November 21, 1950, Consolidated Engineering Corporation, a California corporation, filed three actions in the District Court of the United States for the Southern

District of California, Central Division, against William D. Nesbit, Hugh F. Colvin and James R. Bradburn. The complaints in each of the three cases prayed for the recovery of profits realized by the defendant in each case through dealings in the stock of the plaintiff, under Section 16(b) of the Securities Exchange Act of 1934, 15 U. S. C. A., Section 78p(b). Jurisdiction of the District Court was based upon Section 27 of the Act, U. S. C. A., Section 78aa. [Tr. of R. pp. 3, 27, 50.]

The action against William D. Nesbit bore the lowest filing number and was assigned to the Honorable Harry C. Westover, District Judge. Under the local rules of the District Court the other two actions were transferred to the same judge in view of the similarity of issues, although no order for consolidation has been made. Answers on behalf of each defendant were filed and thereafter, by leave of Court, amended answers were filed on April 30, 1951, and the case was heard upon the issues raised by the complaints in each case and such amended answers. [Tr. of R. pp. 7, 31, 54.]

On March 7, 1951, the Trial Court made and entered an order for pre-trial proceedings. Pursuant to this order plaintiff and defendant in each case on May 28, 1951, filed pre-trial stipulations, containing in each case a stipulation of facts, a statement of facts which the parties were unable to concede and a statement of plaintiff's objections to admissibility of certain stipulated facts. [Tr. of R. pp. 11, 44, 59.] Various pre-trial hearings and conferences were held and memoranda and briefs filed by the

parties and the cases were set for trial on July 20, 1951, on certain limited issues of fact raised by the allegations contained in the second, third, fourth and sixth defenses contained in the amended answer of the defendant in each case. The matter was tried on this date, with testimony being introduced on behalf of both parties in each case, and further stipulations of fact entered into in open court, following which the cases were submitted for decision on the issue of liability only. [Tr. of R. pp. 84, 92, 101.]

Thereafter the Securities and Exchange Commission moved the Trial Court for leave to file a brief as *amicus curiae,* which motion was unopposed and was granted on September 10, 1951. The Securities and Exchange Commission then filed a memorandum as *amicus curiae,* defendants filed memoranda in opposition thereto and the Securities and Exchange Commission filed a further informal memorandum in letter form.

On October 10, 1951, the Trial Judge made and entered his opinion covering all three cases, reviewing the law and the evidence and finding generally that there had been no violation of the purpose of the Securities Exchange Act of 1934 and that the plaintiff corporation was estopped by its conduct from recovering profits, if any, realized by the defendants. [Tr. of R. p. 76.]

On October 30, 1951, the Trial Court made and entered its findings of fact and conclusions of law and its judgment in each of the actions. No appeals have been taken from the judgments. [Tr. of R. pp. 84, 91, 92, 99, 101, 108.]

On November 27, 1951, Carmelo J. Pellegrino, the appellant, filed a notice of motion to intervene, without a supporting affidavit, and obtained an order shortening time to November 29, 1951, for the hearing of the motion. [Tr. of R. p. 109.] At the hearing appellant served and filed his affidavit in support of the application to intervene, summarizing certain correspondence between appellant's attorney, Morris J. Levy, Esq., and plaintiff's attorneys, and further summarizing certain conversations between appellant and his attorney. [Tr. of R. p. 112.] The motion was heard and denied. [Tr. of R. p. 117.]

On the same day, November 29, 1951, appellant filed his notice of appeal, appealing from the order denying him leave to intervene and on January 18, 1952, filed his statement of the point upon which he intends to rely on appeal, to-wit: that the District Court erred in denying his motion to intervene in each of the actions. [Tr. of R. pp. 118, 121.]

II.
STATEMENT OF ISSUES PRESENTED.

The sole issue presented on this appeal is whether the District Court erred in denying appellant's motion for leave to intervene.

III.
ARGUMENT.

A. The Sole Issue Presented on This Appeal Is Whether the District Court Erred in Denying Appellant's Motion for Leave to Intervene.

Appellant in this case has appealed from the order denying him leave to intervene. [Tr. of R. p. 118.] He has stated to this Court that the point upon which he intends to reply on this appeal is that the District Court erred in denying his motion to intervene. [Tr. of R. p. 121.]

Notwithstanding this state of the record, appellant in his opening brief now endeavors to argue that the District Court erred in granting the judgments, from which no appeal has been taken, and appellant seeks a reversal of these judgments. A considerable portion of his brief, as well as practically all of the brief filed by the Securities and Exchange Commission as *amicus curiae,* is devoted to the merits of the judgments and not to the propriety of the order denying intervention.

The purpose of the requirement that appellant file a statement of the points on which he intends to rely is "to enable the appellee to determine what additional portions of the record he shall specify." *Ashton v. Town of Deerfield Beach,* (C. C. A. 5, 1946) 155 F. 2d 40; *Keeley v. Mutual Life Insurance Company,* (C. C. A. 7, 1940) 113 F. 2d 633.

In reliance upon the notice of appeal and the statement of the point upon which appellant intends to rely, appellees have not designated additional portions of the record for use on this appeal. Appellant's attempt to expand the scope of this appeal is therefore prejudicial to appellees in addition to being clearly improper under Rule 19 (6) of the

Rules of the United States Court of Appeals for the Ninth Circuit and the decisions of this Court in *Western National Insurance Co. v. LeClare,* (C. C. A. 9, 1947) 163 F. 2d 337, and *Bank of America N. T. & S. A. v. Commissioner of Internal Revenue,* (C. C. A. 9, 1942) 126 F. 2d 48.

The only authority which appellant cites in support of his contention that the judgment itself may be considered is the case of *Park & Tilford, Inc. v. Schulte,* (C. C. A. 2, 1947) 160 F. 2d 984, *cert. den.,* 332 U. S. 761, 68 S. Ct. 64, 92 L. Ed. 347. In that case, however, there was an appeal already pending between the original parties and the Court of Appeals had before it the entire record of a case in which all issues had been tried. In the case at bar the record is incomplete in many respects, the evidence not being before this Court and factual issues raised by defendants' first and fifth defenses, in each case, remain untried and not completely covered by the stipulations. Further comment on these issues will be made below in this brief but, for the present purpose, it appears clear that the question of the merits of the judgment below is not properly before this Court.

B. Appellant Was Not Entitled to Intervene as a Matter of Right.

Appellant bases his right to intervene on Rule 24 (a) of the Federal Rules of Civil Procedure which provides as follows:

> "(a) *Intervention of right.* Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; . . ."

Under this rule appellant must show that both of the required elements are present; *i.e.,* that representation by existing parties is or may be inadequate *and* that applicant is or may be bound by the judgment.

1. Appellant Has Made No Showing That the Representation of His Interest Is or May Be Inadequate.

Appellant was apparently satisfied with the adequacy of the representation of his interest by the corporation and by the attorneys for the corporation up to the time of the entry of the judgments. At least, no move to intervene was made by him during this period and there is no suggestion, either by appellant or by the Securities and Exchange Commission, that the prosecution of the action by the corporation and by its attorneys was not entirely diligent and proper. Such a claim, if made, would be absurd in view of the record of this case, affirmatively showing a complete presentation to the Court of the facts and the law favorable to the corporation [Tr. of R. pp. 84, 92, 101.]

Appellant's sole and only showing is that the board of directors of the corporation decided not to appeal. His position can only be supported if the decision not to appeal, in itself, sufficiently shows inadequacy of representation and a failure "diligently to prosecute" the action.

The Federal Courts have adopted a liberal policy allowing stockholders to intervene in actions under Section 16 (b) of the Securities Exchange Act were the defendants themselves are in a controlling position over the plaintiff. Thus in *Park & Tilford, Inc. v. Schulte, supra,*

cited by appellant, it appeared that the defendants owned a majority of the voting stock of the plaintiff corporation. The court properly and realistically allowed a minority stockholder to intervene, stating:

> "Under the circumstances here disclosed, the interests represented by defendants and their father were so dominant in the affairs of plaintiff that the District Court should have allowed stockholder representation to guard against even the appearance of any concerted action."

Intervention under these circumstances is unquestionably proper. Appellant and the Securities and Exchange Commission endeavor to create the impression that some similar situation exists in the case at bar. However, in this case the maximum combined stockholdings of all three of the appellees never exceeded a fraction over 3% of the outstanding stock of the plaintiff corporation [Tr. of R. pp. 19, 42, 67] and appellees were not directors of the plaintiff corporation at any of the times here involved [Tr. of R. pp. 4, 28, 51.]

A distinction must be borne in mind between officers and directors of a corporation. Identity of officers, directors and principal stockholders in many corporations often minimizes the differences in the legal status of these groups, but when this is not the case, the distinction is a real one. Management of a corporation lies in the board of directors, *California Corporations Code, Sec. 800; California Corporation Laws, Ballantine & Sterling,* 1949 Ed., p. 77. Ballantine & Sterling characterize the board as the "fountain of executive authority." The position of an officer of a corporation, when he is not a director or large shareholder, is nothing more than a hired employee, subject to the will and direction of the board of directors.

He is not legally entitled to participate in the deliberations of the board nor to have a voice, as officer, in the essential decisions establishing the policy of the corporation.

There is absolutely no showing of any kind made by appellant in this case that the appellees, or any one of them, exercised any influence or control of any kind whatsoever over the board of directors of Consolidated Engineering Corporation, or that the board of directors was in any way influenced by any solicitude for their welfare in any decisions made with respect to these actions. Presumably, and in fact, the board of directors acted only with the welfare of the shareholders in mind. Without any such showing of influence or control the basis for intervention on the ground of inadequacy of representation, in reliance on such decisions as the *Park & Tilford* case, wholly fails.

Appellant also claims that inadequacy of representation, is established from failure to appeal the judgments in these cases on the ground that this constitutes a failure "diligently to prosecute" the actions under the terms of Section 16(b) of the Act.

This phrase is nowhere defined in the Act and its meaning is left to construction by the courts. The words "diligence" and "diligently" have been construed in a great many cases and are almost universally taken to mean the kind of conduct, or degree of care, which prudent men would normally apply to their own concerns and affairs. The words have no specific content but always depend upon the facts and circumstances of the particular case. (26 C. J. S., pp. 1309-1311.) Nothing appears to indicate that any unusual meaning is to be attributed to these words as used in the Act.

Whether the board of directors of the plaintiff corporation acted "diligently" would therefore appear to depend upon the propriety of the action taken in view of all of the facts and circumstances which might properly be considered by the board as affecting the best interests of the shareholders. By ignoring substantial issues in these cases, other than that of estoppel, and by ignoring the factual basis for the decision of the trial court, appellant has presented a falsely oversimplified picture of the problems facing the board of directors in making its decision. Particularly, by ignoring the facts on which the trial court found an estoppel to be based, appellant has been able to point to other decisions of the Federal Courts and claim them to be "on all fours" with the cases at bar.

To point anything like a realistic picture of the considerations which might properly have led the board of directors to its decision not to appeal these cases would require going outside the record to a considerable extent. However, there is enough in the findings of fact and the opinion of the Trial Court to give a partial picture of the situation and reference will now be made to some of these circumstances, as revealed by the record, in order to give the Court a basis for determining whether the board of directors acted "diligently."

In its opinion, the Trial Court said:

> "Evidence in the case indicates that the idea of the stock option contracts originated with Philip S. Fogg, President of Consolidated Engineering Corporation, prior to the listing of plaintiff's stock on any national exchange as a means of retaining the services of the sixteen key men and as incentive to these men to use their best efforts for the benefit of the corporation. Included among the sixteen were the three defendants

in these actions, they being the only employees holding the conventional titles of officers of the corporation.

"At the time the option agreements were executed they had little value. After the options acquired a value (because of the rise in value of the stock) a meeting of the optionees was called by Mr. Fogg, at which meeting the tax problem incident to the exercise of the option agreements was brought to the attention of the option holders and suggestion was made that they be exercised annually to lessen the impact of tax accruing upon exercise of an option. The fact that optionees did not have additional resources sufficient to pay the tax and purchase stock, without concurrently selling a portion of their purchased stock, was discussed at the meeting. It was then made known to the optionees that they could (through a brokerage house of which one of the directors of plaintiff corporation was a partner) effect sales of stock in order to procure funds to take up their options.

"The various employees commenced taking up options, in most cases using the forms prepared or suggested by plaintiff corporation. At no time from the date of the first listing of the stock on an Exchange to the date of the filing of the actions herein did the management of the corporation, or anyone else, issue any bulletin, circular, letter, notice or any other document, calling the employees' attention to restrictions upon them under the Securities Exchange Act relative to purchase and sale of stock within the six months' period."

"If ever there was a case where equity and good conscience 'would forbid the relief sought', it seems to the Court that the necessary facts are present in these cases at bar, inasmuch as it is established that in lieu of paying additional salary to retain the services of these employees, the option agreements were given;

> that the transaction was initiated and handled by plaintiff corporation herein and, before consummation, had to be approved by the Corporation Commissioner of the State of California; that nothing was ever intimated to any of the defendants that if they exercised their options and purchased any stock, reselling within six months at a profit, they would have to pay to the corporation the profits realized. As all the parties were acting in good faith, deeming the agreement valid, it would seem most inequitable now, after the corporation has had the benefit and advantage of the option agreements for several years, to allow plaintiff corporation to recover from defendants in accordance with the prayers of its complaints." [Tr. of R. pp. 77-79.]

None of the cases cited by appellant nor any of the cases under the Securities Exchange Act of 1934 discovered by the parties or the Securities and Exchange Commission in their research on the legal problems involved in this case reflect a factual situation remotely similar to that which was revealed to the trial court in this litigation, and a part of which is summarized by the trial court in the above quotation from its opinion.

At the trial level it was assumed by defendants and by the Trial Court that these cases were brought in equity under the provisions of Section 16(b) providing that suit to recover profits may be instituted "at law or in equity" [Tr. of R. p. 83]. It now appears for the first time that the Trial Court was mistaken in assuming that the Securities and Exchange Commission agreed with this conclusion, as the Commission in its brief (S. E. C. Br. p. 7, footnote 3) apparently disagrees, although no reason or authority is stated showing the Trial Court to be wrong.

In *Arbetman v. Playford & Alaska Airlines, Inc.* (D. C. S. D. N. Y., 1949), reported in Commerce Clearing House Federal Securities Law Reporter, paragraph 90439, an action was brought by a shareholder under Section 16(b) of the Act. Plaintiff made no demand for a jury trial but the defendant did and plaintiff's motion to vacate defendant's demand was granted by the District Court. The Court called attention to the fact that such an action was not for the direct benefit of the plaintiff but for the benefit of the corporation and its shareholders and was thus a derivative suit in the nature of an equitable action. Under Section 16(b) of the Act plaintiff had a choice of bringing his action at law or in equity and, by failing to seek a jury trial, had exercised this choice to bring his action in equity.

This question is probably of no great importance, since all actions in the district courts are now "civil actions" and the distinction between law and equity has largely been abolished by Rule 2 of the Federal Rules of Civil Procedure. Equitable defenses may now be interposed to legal actions. (Federal Practice and Procedure, Rules Edition, Barron and Holtzoff, Vol. 1, Sec. 141. See *Maltz v. Sax* (C. C. A. 7, 1943), 134 F. 2d ....., cert. den. 319 U. S. 772, 63 S. C. 1437, 87 L. Ed. 1720, and *Bruckman v. Hollzer* (C. C. A. 9, 1946), 152 F. 2d 730.) The distinction, in the federal courts, has meaning only with reference to the right to a jury trial. (Rule 38(a), Federal Rules of Civil Procedure; *Bruckman v. Hollzer, supra.*) Moreover, although "equitable estoppel" originated in the courts of equity, it is generally a defense at law, even where the old distinctions between law and equity are preserved. (31 C. J. S., p. 252.) The Trial Court was therefore unquestionably correct in considering an "equitable" defense in this case, particularly where the

nature of the action is similar to a stockholder's derivative suit, traditionally an equitable proceeding. (*United Copper Securities Co. v. Amalgamated Copper Co.* (1917), 244 U. S. 261, 37 S. Ct. 509, 61 L. Ed. 1119.)

Appellant has cited the case of *Park & Tilford v. Schulte, supra,* for the proposition that estoppel does not apply in this type of litigation. The reference of the Court in that case to "estoppel" is a verbal coincidence and nothing more.

The "estoppel" that was the subject of comment in that decision was not an estoppel *in pais* arising from the conduct of the parties prior to the commencement of the litigation, but concerned a reversal of the legal position of the intervenor and the Securities and Exchange Commission, during the course of the appeal, with respect to the proper method for measuring damages. There is not the remotest resemblance of this situation to the "estoppel" in the case at bar despite the fact that the same word is used in both connections.

In its brief, page 11, the Securities and Exchange Commission has cited a decision of the District Court for the Eastern District of Louisiana, rendered April 2, 1952, as authority for the proposition that estoppel is not available as a defense in this type of action. (*Jefferson Lake Sulphur Co. v. Walet* (D. C. E. D. La., 1952), ... Fed. Supp. .....), reported in Commerce Clearing House Federal Securities Law Reporter, paragraph 90526.) This decision was, of course, rendered long after the judgments in the case at bar. In the Louisiana case the defendant was the president and a director of the plaintiff corporation who had purchased its shares, in part on an exchange and in part under an option, and made sales of shares

within a 6 months' period. A defense of estoppel was interposed based on the argument that the corporation had waived its rights by executing the option agreement in the first place and that the purpose of the agreement was to give the president a profit on short swing transactions as additional compensation.

No claim has at any time been made by the appellees in the cases at bar that there was any estoppel against the corporation merely by reason of the execution of the option agreements or the intention on the part of the corporation that through the option agreements the appellees would receive additional compensation for their services.

Although the testimony in the case at bar is not before the appellate court, a part of the facts on which the Trial Court based its decision are disclosed by the Trial Court's opinion and the findings of fact made. [Tr. of R. pp. 76, 84, 92, 101.] It was on these facts, and not on the fact of the execution of the option agreement itself, that estoppel was based.

Briefly, it appears that after the options had acquired a value because of the rise in value of the stock there was a meeting of all the optionees called by the president of the corporation. At this meeting there was brought to the attention of the optionees the tax problem which existed by reason of the fact that a profit for tax purposes was, under the law at that time, realized upon the exercise of the option. The optionees were advised to exercise their options annually in order to lessen the impact of the tax. There was discussion of the fact that the optionees did not have sufficient resources of their own to pay the tax and buy the stock, unless they concurrenty sold a portion of the stock taken up under the option agreements.

It was made known to the optionees that they could make such sales of stock in order to procure funds to take up their options through a brokerage house of which one of the directors of the plaintiff corporation was a partner.

The forms to be used for carrying out these transactions were prepared or suggested by the plaintiff corporation and the corporation at no time called the employees' attention to any restrictions upon them under the Securities and Exchange Act. Although all of the parties were acting in the best good faith throughout, the effect of the actions of the principal officers and directors of the corporation was to lay a veritable trap for the employees of the corporation who bore the titles of officers. The effect of the transaction, if the view of the Securities and Exchange Commission is followed, would be that the corporation would obtain the benefit of the efforts of these appellees, which contributed substantially to the success of the company, and in return therefor would penalize them heavily. It must be remembered that these employees were taxable upon any profits in these transactions and that, if forced to return such profits to the corporation, no tax deduction is allowed.

The Trial Court's conclusion was that:

> "If ever there was a case where equity and good conscience 'would forbid the relief sought,' it seems to the Court that the necessary facts are present in these cases . . ." [Tr. of R. p. 82.]

Although incomplete, enough of the factual situation is shown by the above to differentiate the case clearly from the cases cited by appellant and which appellant claims to be "on all fours" or determinative of the issues in this case. None of the factual elements here were to any

degree present in *Steinberg v. Sharpe* (C. A. 2, 1951), 190 F. 2d 82; *Park & Tilford, Inc. v. Schulte, supra; Smolowe v. Delendo Corp.* (C. A. 2, 1943), 136 F. 2d 231, cert. den. 320 U. S. 751, 64 S. Ct. 56, 88 L. Ed. 446, or *Gratz v. Claughton* (C. A. 2, 1951), 187 F. 2d 46, cert. den. 341 U. S. 920, 71 S. Ct. 741, 95 L. Ed. 1353.

Appellant and the Securities and Exchange Commission further assert that the defense of estoppel is inapplicable because of the provision in Section 29(a) of the Act (15 U. S. C. A. 78cc(a)), providing that "any condition, stipulation, or provision binding any person to waive compliance with any provision of this act shall be void." The argument is that since the corporation cannot be prevented from recovery by an express waiver, neither can an implied waiver be effective for this purpose.

This argument wholly misses the distinction between a "waiver" and an "estoppel." At no time in the case at bar have appellees contended that it would be possible for the corporation to make an express waiver of the rights given to it under Section 16(b). It is obvious that any such attempt on its part would show knowledge of the provisions of Section 16(b) on the part of both parties and would be affirmative evidence of bad faith. However, there is a clear-cut distinction between a waiver of the type contemplated by the Act and an estoppel which arises when conduct of one of the parties makes judgment in favor of that party inequitable. A waiver is a "voluntary relinquishment of a known right" while an estoppel arises when one party, by its conduct, has led another party to take certain steps to his injury and has accepted the benefit of the steps so taken. An estoppel may arise even though no waiver in advance would be valid. (See

67 C. J. S., p. 289; 31 C. J. S., pp. 245-246; 56 Am. Jur., pp. 102-104.)

Although the Trial Court rested its decision on the basis of an estoppel, there were many other defenses raised by the defendants in these actions which would have required determination in the event that the Trial Court had felt that an estoppel did not apply. Without going at length into these issues, appellees will merely refer to a few which were briefed at length and argued in the trial below as applicable on the pleadings in these cases. One such issue is the effect of the community property laws of the State of California under Section 16(b) of the Act, this being a point on which considerable research and briefing was done by the parties and by the Security and Exchange Commission. Another and difficult issue was the question of the application of Section 16(b) to an employment contract covering the accrual of options over a period of years, entered into prior to the listing of the corporation stock on any national securities exchange, and the effect between the parties of such subsequent listing which, under the six months rule of Section 16(b) would prevent employees from selling any portion of the stock purchased during the entire term of their employment. Another issue arose from defendants' contention that the legal effect of the issuance by the Securities and Exchange Commission of its rule X-16B-6, effective November 29, 1950, was to exempt the transactions here in question from the operation of Section 16(b). A further issue in the case was the applicability of Section 16(b) to stock acquired by one of the defendants through conversion of bonds of the corporation purchased prior to the execution of the option agreements. In addition to the issues affecting legal liability, there were many and difficult issues

with respect to the proper measure of damages, if any, if liability were established, defendants disagreeing that any values stated in the stipulation of facts in each of the three cases were necessarily determinative of the value of their options on the accrual dates, the dates of the issuance of the shares, the dates six months prior or subsequent to the dates of any sale or any other relevant dates involved in the transactions.

Unless the words "diligently to prosecute" as used in the Securities Exchange Act are given some strange and novel meaning, the board of directors of the plaintiff corporation was entitled to consider the expense and uncertainty of litigating all of these issues, as against any possible benefit to the company which might come from recovery in the cases, and they were further entitled to consider the effect on the company of the cases in every way which bore upon the interest of the shareholders. Presumably the board of directors was acquainted with all of these matters, through their counsel. At least appellant has made no showing and has intimated nothing to the contrary.

The decision of a board of directors of a corporation with respect to litigation appears to be in no respect essentially different from a decision as to any other corporate matter. This is true notwithstanding that a statute such as the Securities Exchange Act is involved. In *United Copper Securities Co. v. Amalgamated Copper Co.,* 244 U. S. 261, 37 S. Ct. 509, 61 L. Ed. 1119 (1917), the Sherman Anti-Trust Law was involved. A stockholder had made demand upon the plaintiff corporation to bring suit to recover treble damages. The corporation had refused and the stockholder had brought suit in its

name. Dismissal of the complaint was affirmed by the Supreme Court. The Supreme Court stated:

> "Whether or not a corporation shall seek to enforce in the courts a cause of action for damages is, like other business questions, ordinarily a matter of internal management, and is left to the discretion of the directors, in the absence of instruction by the vote of the shareholders. For aught that appears, the course pursued by the directors has the approval of all of the stockholders except the plaintiffs. The fact that the cause of action is based on the Sherman Law does not limit the discretion of the directors or the power of the body of stockholders; nor does it give to individual shareholders the right to interfere with the internal management of the corporation."

The Supreme Court went on to point out that under the long settled rule a derivative action by a shareholder was equitable in nature and that this rule had not been changed by the Sherman Anti-Trust Law, although such law provided an action for damages.

In the case of *Findley v. Garrett,* 109 A. C. A. 161, 240 P. 2d 421 (1952), the California court affirmed a dismissal of a shareholders derivative action based on allegations of fraud, conspiracy and bad faith on the part of a majority of the directors. In the course of its opinion the court said:

> "The power to manage the affairs of a corporation is vested in the board of directors. Scott v. Los Angeles Mountain Park Co., 92 Cal. App. 258, 264, 267 P. 914. Where a board of directors, in refusing to commence an action to redress an alleged wrong against a corporation, acts in good faith within the scope of its discretionary power and reasonably be-

lieves its refusal to commence the action is good business judgment in the best interest of the corporation, a stockholder is not authorized to interfere with such discretion by commencing the action. See Fornaseri v. Cosmosart Realty & Bldg. Corp., 96 Cal. App. 549, 557, 274 P. 597. In the case last cited it was said at page 557 of 96 Cal. App. at page 600 of 274 P.: '(C)onduct of directors in the management of the affairs of a corporation is not subject to attack by minority stockholders . . . where such acts are discretionary and are performed in good faith, reasonably believing them to be for the best interest of the corporation.' Also, on said page, it was said: 'Good business judgment would seem to recommend the safe and sure plan which was adopted by the directors . . . At least the transaction appears to be a discretionary matter, and, if so, affords a stockholder no authority to challenge it in this equitable action. Every presumption is in favor of the good faith of the directors. Interference with such discretion is not warranted in doubtful cases.' . . .

"Notwithstanding the insufficiency of the allegations of fraud and bad faith, it was necessary for the court to consider whether, on the facts alleged, the refusal of the directors to prosecute the claims was so clearly against the interests of the corporation that it must be concluded that the decision of the directors did not represent their honest and independent judgment. The facts alleged would not have justified such a conclusion. It was a question of business whether the transactions over a twelve-year period should be investigated and prosecuted. Directors have the same discretion with respect to the prosecution of claims on behalf of the corporation as they have in other business matters. In this respect the fact that a claim may be founded in fraud does not

differentiate it from other claims. Refusal to sue on a fraud claim is not, as plaintiffs contend a ratification of fraud. The mere fact that a recovery for the corporation would probably result from litigation does not require that an action be commenced to enforce the claim. Even if it appeared to the directors of Douglas that at the end of protracted litigation substantial sums could be recovered from some or all of the defendants, that fact alone would not have made it the duty of the directors to authorize the commencement of an action. It would have made it their duty to weigh the advantages of a probable recovery against the cost in money, time and disruption of the business of the company which litigation would entail."

In the case at bar there was obviously ample reason for the board of directors to make the decision which it did. Appellees had no opportunity to investigate or to present as a part of this record any of the facts which the board actually considered, as the motion by appellant was made too late to allow time for this purpose. However, it is always presumed that a board of directors acts in the interest of the corporation in good faith, and there is absolutely no showing or intimation to the contrary here. Unless the Securities Exchange Act of 1934 by implication repealed all of the law applicable to the internal management of corporations, no showing of any sort has been made that the failure to appeal was the failure of diligence in prosecution within the meaning of the Act and was not done in the best interests of the corporation and its shareholders, in complete good faith. Under these circumstances appellant has failed completely to bring himself within the requirement that his representation by the corporation was or might be inadequate.

2. Appellant Has Made No Showing of Any Substantial Interest Which Is Affected by the Judgments in These Actions.

In a sense it is true that appellant, as a shareholder of plaintiff corporation, will be bound by the judgments entered in these three cases. This is as true as the statement that any judgment for or against a corporation, any contract entered into by a corporation or any other act by a corporation, in a sense, binds its shareholders. However, the showing of prejudice to appellant by these judgments must certainly reveal a substantial interest and appellant cannot invoke the rule as to intervention of right to protect a trivial, inconsequential or improper interest.

The case of *Wolpe v. Poretsky* (C. A. D. C., 1944), 144 F. 2d 505, cert. den. 323 U. S. 777, 65 S. Ct. 190, 89 L. Ed. 621, indicates the type of situation and the type of interest to which the rule was undoubtedly meant to apply. In that case a judgment had been entered enjoining the members of a zoning commission from carrying into effect a zoning order. Adjoining property owners were accorded the right to intervene, after the decree was entered, upon a showing that the zoning commission, without any public hearing or other notice to the property owners affected, had voted not to make an appeal, and that the properties of the intervenors would be seriously damaged by the ruling of the trial court. In this case a proper showing was made that the commission had not adequately considered the interests of the intervenors and that such interests were substantial and real.

The other cases cited by appellant, *Bronson v. LaCrosse & Milwaukee R. R. Co.*, 2 Wall. 283, 17 L. Ed. 725 (1864); *Klein v. Nu-Way Shoe Co., Inc.* (C. C. A. 2,

1943), 136 F. 2d 986, and *Golconda Petroleum Corporation v. Petrol Corporation* (D. C. S. D. Calif., 1942), 46 Fed. Supp. 23, were instances of intervention to protect substantial interests. In none of these cases was intervention sought to protect a trivial interest or to gain an advantage unconnected with the protection of the interest involved.

The case at bar reveals quite a different situation. In his affidavit in support of his motion to intervene, appellant claims to be the owner of two shares of the common stock of plaintiff corporation. Appellees had no opportunity to put into the record the total amount of outstanding stock of plaintiff corporation on the date of the judgment, but the record does give at least some information in this respect which may be utilized for the purpose of the present argument. The stipulations of fact show that at all times mentioned in the complaint plaintiff had a minimum of 174,190 shares outstanding. [Tr. of R. pp. 19, 42, 67.]

Under Rule X-16B-6 of the Securities and Exchange Commission any recovery in these cases would in any event be limited to the difference between the sales price and the market value of the securities sold between a date 6 month before and a date 6 months after the date of sale. If the judgments in these cases were reversed, if every defense asserted by the defendants was disregarded and if all of defendants' contentions with respect to the measure of damages were also disregarded, the maximum possible gross recovery to the plaintiff corporation in the three cases, under the Securities and Exchange Commission rule would be as follows: William D. Nesbitt $5,942.50, Hugh F. Colvin $4,444.00, James R. Bradburn $7,091.25, or a total of $17,477.75.

The application of the rules established for determining damages and of the rule of the Securities and Exchange Commission is somewhat difficult on the facts stipulated but appellees believe that the figures quoted are accurate within reasonably narrow limits and that it is unnecessary for present purposes to set forth at length herein the calculations from which these figures are derived.

Assuming, therefore, that the plaintiff corporation recovered the maximum possible amount against all three defendants and assuming, contrary to fact, that the total outstanding shares of plaintiff corporation is not more than as stated, the gross recovery applicable to appellant's stock interest would be 2/174,190 of $17,477.75 or 20¢.

Appellant has made no showing that it is in the best interests of the corporation or any of its shareholders to pursue this litigation. As noted by the Supreme Court in the *United Copper Securities Co.* case, *supra:* "For aught that appears, the course pursued by the directors has the approval of all of the stockholders except the plaintiffs" (here the appellant). Appellant's own stake in the case is of such a nature that the rule of *de minimis non curat lex* might well be applied and his appeal dismissed. (*In re United Light and Power Company* (D. C. D. Del., 1943), 51 Fed. Supp. 217; *Anderson v. Mt. Clemens Pottery Company* (1946), 328 U. S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515; *Frank v. Wilson & Co., Inc.* (C. A. 7, 1949), 172 F. 2d 712, and *Porter v. Rushing* (D. C. W. D., Ark., 1946), 65 Fed. Supp. 759.)

According to appellant's affidavit, appellant purchased his shares on September 11, 1950, and on October 2, 1950, his attorney, Morris J. Levy, Esq., made demand upon the plaintiff corporation that suit be brought against

defendants. It certainly "could be assumed" that the shares were purchased for the sole purpose of instigating these actions. [See Opinion of the Trial Court, Tr. of R. p. 79.] It can only be assumed that appellant is not the real party in interest here and that his effort to intervene is nothing more than an attempt to foster litigation and compel the payment of fees to his attorney.

This type of activity on the part of an attorney is the kind usually pursued at the risk of disbarment (see Canons of Professional Ethics of American Bar Association, Canon No. 28), but is condoned in cases coming within the scope of Section 16(b) of the Securities Exchange Act of 1934 because Congress has not seen fit to provide other methods of enforcement of the provisions of this section. However, such conduct may make appellant subject to the defense that his hands are not clean. See *Magida v. Continental Can Company* (D. C. S. D. N. Y., 1951), 12 F. R. D. 74, in which the Trial Court denied a motion for summary judgment made by appellant's attorney on behalf of his client in that case, and in which the Court said that as to the circumstances under which plaintiff acquired his 10 shares "it may be that facts will develop at the trial which will call for an application of the doctrine of 'unclean hands.'"

The defense of "unclean hands" may even be considered by the Court on its own motion and has been held to apply despite the public interest in the statute under which the action is brought. For such application in the case of a violation of the Sherman Anti-Trust Law, see *Maltz v. Sax, supra.*

Neither the trivial interest of appellant in the judgments in these cases or the interest of his attorney in

the fees which might be recovered if the judgments were reversed are such interests as entitle appellant to intervene as a matter of right, on the pretext that he will be bound by these judgments.

C. The District Court Did Not Abuse Its Discretion in Denying Appellant Leave to Intervene.

If appellees are correct and appellant is not entitled to intervene as a matter of right, then the granting or denying of appellant's motion was a matter entirely within the discretion of the Trial Court and its action will not be disturbed except for a clear abuse of discretion, if the order is appealable at all. Considerations already stated in this brief would uphold the Trial Court in finding a wholly insufficient showing by appellant of any grounds justifying permissive intervention.

Stallings v. Conn (C. C. A. 5, 1934), 74 F. 2d 189;

Cameron v. Harvard College (C. C. A. 1, 1946), 157 F. 2d 993;

Delno v. Market Street Ry. Co. (C. C. A. 9, 1942), 124 F. 2d 965;

Allen Calculators, Inc. v. The National Cash Register Co. (1944), 322 U. S. 137, 64 S. Ct. 905, 88 L. Ed. 1188.

Regardless of whether intervention is a matter of right or permissive, Rule 24(a) requires timely application. Whether an application is timely is a matter for the Trial

Court and its decision will not be disturbed on appeal unless there is a clear abuse of discretion.

Federal Practice and Procedure, Rules Edition, Barron & Holtzoff, Vol. 2, page 206;

United States v. Columbia Gas & Elec. Corp. (D. C. D. Del., 1939), 27 Fed. Supp. 116, app. dism. 108 F. 2d 614, cert. den. 309 U. S. 687, 60 S. Ct. 887, 84 L. Ed. 1030;

Miami County National Bank v. Bancroft (C. C. A. 10, 1941), 121 F. 2d 921;

Mullins v. De Soto Securities Co., Inc. (D. C. W. D. La., 1942), 2 F. R. D. 502, aff'd on this point, 136 F. 2d 55;

Consolidated Gas Elec. L. & P. Co. v. Pennsylvania W. & P. Co. (C. A. 4, 1952), 194 F. 2d 89;

Stallings v. Conn, supra;

Delno v. Market Street Ry. Co., supra.

The application in this case was not timely and appellees were substantially prejudiced by the filing of the supporting affidavit on the day of the hearing, giving appellees no opportunity to file answering affidavits for consideration by the appellate court. It must be remembered that appellant could have intervened in this action at any time after November 21, 1950. (*Twentieth Century Fox Film Co. v. Jenkins* (D. C. S. D. N. Y., 1947), 7 F. R. D. 197.) However it has been held that intervention at this point will not justify a duplication

of attorney's fees. (*Berkey & Gay Furniture Co. v. Wigmore* (D. C. S. D. N. Y., April 15, 1947) reported in Commerce Clearing House Federal Securities Law Reporter, paragraph 90376.) At any rate, appellant made no move to intervene during the period of more than eleven months between the date of filing the action and the date of the judgment. By appellant's own affidavit in support of his application to intervene, it appears that he had knowledge that the Trial Court had rendered its decision dismissing the suits within a day or so after October 29, 1951. [Tr. of R. p. 114.] If appellant desired to protect his right to appeal, he could have made application immediately after such notice, which would have given appellees the ten-day period required by the rules of court to investigate the matters contained in appellant's moving affidavits and to prepare answering affidavits for the record. If a motion on two days' notice, without supporting affidavits, noticed for the day on which the appeal must be filed, is timely, then it is impossible to conceive of any application being untimely.

Whether or not intervention is a matter of right or permissive, application for leave to intervene must be made in proper form, with proper supporting documents, and in accordance with the rules of court. (*Miami County National Bank v. Bancroft, sura.*)

In this case there was a complete failure to comply with these requirements. No supporting affidavit was served with the notice of motion as required by Rule 6(d) of the

Federal Rules of Civil Procedure. The notice of motion did not "state with particularity the grounds therefor" as required by Rule 7(b)(1) of the Federal Rules of Civil Procedure. The notice of motion and the order shortening time thereof did not comply with Rule 3(b) of the Rules of Civil Procedure for the United States District Court for the Southern District of California. No memorandum of points and authorities was served with the notice of motion as required by Rule 3(d) of the Local Rules. Under the last mentioned rule, failure by the moving parties so to serve and file affidavits and a memorandum of points and authorities is deemed a waiver of the motion.

The affidavit in support of the motion, as finally served and filed on the morning of the hearing, is wholly insufficient and improper. Apart from the statement that affiant is the owner of two shares of the plaintiff corporation, the affidavit consists of summaries of unproduced letters between affiant's attorney and plaintiff's attorneys and references to conversations between affiant and his attorneys. Affiant does not state that the letters summarized were the only letters between the parties, which appellees understand is not the case. The entire affidavit is an incompetent and hearsay statement of matters not within the knowledge of appellees and which they had no opportunity to investigate or contradict.

Under these circumstances the Trial Court properly exercised its discretion and no abuse of discretion has been shown.

D. Conclusion.

The narrow issue before this Court is whether the Trial Court erred in denying a motion for leave to intervene. Appellees believe that it has been shown that appellant made no sufficient showing to entitle him to intervene and that the Trial Court's order was entirely correct.

Appellant and the Securities and Exchange Commission have endeavored to bring before this Court the question of the propriety of the judgments entered in these actions. While this issue is not properly before the Court, the record of the litigation must, of course, furnish the background for the determination of the narrow issue which is to be resolved.

The positions of the respective parties are clear. The plaintiff corporation and its board of directors are concerned for the interests of its shareholders. To the Securities and Exchange Commission, according to its brief: "The corporation and its security holders are but instruments to vindicate the statutory policy against short-term trading by insiders." The appellant, in turn, with his two shares of stock, is but an instrument for the recovery of attorney's fees by his attorney. Neither the Securities and Exchange Commission nor appellant nor appellant's attorney care one whit for the interest of the real parties plaintiff, the shareholders of the plaintiff corporation.

There is no question of the desirability of enforcing the Securities Exchange Act of 1934 so as to accomplish

its legitimate objectives and the purpose of the Congress in its enactment. Appellees refuse to believe that such an act may not be administered, and such purposes accomplished by the courts, without allowing it to become an instrument of oppression against honest men. Nor do appellees believe that the courts should allow the act to be used for such purposes as appellant is seeking to pursue here.

The application for leave to intervene was untimely, appellant has made a totally insufficient showing of any real reason for intervention, and the decision of the Trial Court on his application should be upheld.

Respectfully submitted,

WILLIS SARGENT and
SIDNEY H. WYSE,
Attorneys for Appellees William D. Nesbit, Hugh F. Colvin and James R. Bradburn.

No. 13220

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARMELO J. PELLEGRINO,

Appellant,

vs.

WILLIAM D. NESBIT, HUGH F. COLVIN, JAMES R. BRADBURN and CONSOLIDATED ENGINEERING CORPORATION,

Appellees.

APPELLANT'S REPLY BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Textbooks

No. 13220

IN THE

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CARMELO J. PELLEGRINO,

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WILLIAM D. NESBIT, HUGH F. COLVIN, JAMES R. BRADBURN and CONSOLIDATED ENGINEERING CORPORATION,

Appellees.

APPELLANT'S REPLY BRIEF.

POINT I.

Appellant's Application to the District Court for Leave to Intervene Was Timely and the Court Should Have Granted His Motion as a Matter of Right.

Appellees' remarks in their answering brief (p. 26), which surreptitiously seek to impute improper motives and conduct to both appellant and his attorneys, are only a hastily improvised smoke screen thrown up by them in a desperate effort to divert this Court's attention from the real issues involved and their own untenably weak position.

It is true that appellant first directed the corporation's attention to the individual appellees' violation of Section 16(b) of the Securities Exchange Act of 1934. The true

facts, however, are directly contrary and at variance with the insinuation contained in appellees' brief (p. 26) that appellant's "effort to intervene is nothing more than an attempt to foster litigation and compel the payment of fees to his attorney." Instead of immediately moving to intervene in the suits, as would have been the case if appellees' insinuation had an iota of merit, appellant was content to permit the corporation alone to prosecute the actions to final judgment under the impression that they were being prosecuted diligently.

It was not until *after* the District Court had rendered adverse judgments against the corporation and *after* the refusal of its Board of Directors to appeal therefrom with full knowledge that the opinion in the case decided by the United States Court of Appeals for the Second Circuit in *Steinberg v. Sharpe* (C. A. 2, 1951), 190 F. 2d 82, was directly contrary to the District Court's decision, that appellant, in the exercise of the rights expressly conferred upon him by Section 16(b) of the act, moved to intervene for the purpose of appealing from the judgments because the corporation had failed "diligently to prosecute the same thereafter."

That appellant proceeded with due diligence and his application to intervene was timely there can be no doubt. The judgments were entered by the District Court on October 30, 1951. [R. pp. 91-92, 99-100, 108-109.] It was not until *after* appellant's attorney *received* the "letter *dated* November 15, 1951" [R. p. 114] from the corporation's counsel advising him "the Board of Directors by resolution decided that the Company would not take an appeal in any of the three cases" [R. p. 115], that appellant first learned that the corporation would "fail diligently to prosecute the same thereafter."

This Court will undoubtedly take judicial notice that New York City and Los Angeles are many miles apart and that it takes several days from the date mail is *sent* from one city to be *received* in the other. Appellant's motion for leave to intervene was *argued and heard* before the District Court on November 29, 1951, only fourteen (14) days from the date counsel for the corporation *sent* the letter advising that the Board of Directors refused to appeal from the adverse judgments. It is respectfully submitted that under these circumstances, appellant could hardly have been expected to have acted more timely or diligently than he did.

Apart from the fact that Section 16(b) expressly conferred an absolute license upon appellant as a stockholder of the corporation to make demand upon it to recover the short swing profits realized by appellees herein, and that he had no "ulterior motive" as intimated by appellees, the Supreme Court of the United States has stated in *Young v. Higbee,* 324 U. S. 204, 65 S. Ct. 594, 89 L. Ed. 890, that motive of a stockholder in bringing suit for the benefit of his corporation is wholly immaterial and should be disregarded. Thus the Court said at page 214:

> "Nor can we sustain the contention that relief should be denied on the allegations that Young's motive in bringing the proceeding is an unworthy one. His petition sought relief for the benefit of all the stockholders. The rights of these stockholders are not to be ignored because of some motive attributable to Young."

Appellees attempt to capitalize upon the small interest of appellant in the stock of the corporation. The most appropriate answer to this is a quotation from the opinion

in *Huber v. Martin,* 127 Wisc. 412, 105 N. W. 1031, where the Court said:

> "* * * the corporation itself belongs to the members thereof and any such member, however small his interest, may knock successfully at the judicial doors to prevent the use of the corporate assets in any other way than in strict harmony with what has been said (about use for authorized corporate purposes) * * * The idea that a member of a corporation * * * cannot in behalf of himself and others similarly interested apply successfully at the door of equity because his interest as a single member is small is unworthy to be entertained."

The snide remarks by appellees that this appeal "is but an instrument for the recovery of attorney's fees" can best be answered by quoting from an article written by the late Professor Henry W. Ballentine, California's leading authority on corporation law, in 37 Cal. L. Rev. (September, 1949) 399, at page 413:

> "A shareholder before he volunteers as a plaintiff to champion the cause of his corporation's right of action, must give consideration to the time, trouble and expense of bringing such suit and the loss in which he will be involved if he fails to succeed. Since the incentive which the law holds out to make possible the bringing of derivative suits is not any compensation to the plaintiff himself, but a counsel fee to the plaintiff's attorney, it may be desirable not to discourage competent lawyers from instigating shareholders' suits if the suit can be prosecuted and settled only under proper regulation. A liberal allowance of counsel fee is made to plaintiff's counsel according to the benefits secured, as this is the dynamic factor giving the necessary impetus to the

volunteer method of representation in class and derivative suits. Otherwise no shareholder could possibly afford to begin a suit of such size and extreme difficulty with only a comparatively small individual interest in it."

It appears singularly significant from the actions of the appellees in so vigorously opposing appellant's intervention that they fear a diligent prosecution of an appeal.

The individual appellees have attempted to point out in their brief (p. 8) that since their combined stockholdings in the corporation "never exceeded a fraction over 3% of the outstanding stock of the plaintiff corporation" they should not be deemed to have been dominant in the affairs of the corporation, and that the precedent set up by the United States Court of Appeals in the case of *Park & Tilford, Inc. v. Schulte* (C. A. 2, 1947), 160 F. 2d 984, cert. den., 332 U. S. 761, 68 S. Ct. 64, 92 L. Ed. 347, which reversed the District Court and permitted a stockholder of the corporation to intervene in the suit, should not be made applicable to them. Appellees glibly attempt to overlook the realities actually existing in corporations having numerous stockholders scattered all over the world and individually owning only minute percentages of stock therein. A small group of stockholders like appellees owning "a fraction over 3%" can easily dominate and control the corporation.

It is to guard against even such *likelihood* of domination that Section 16(b) made provision that a stockholder could bring suit on behalf of the corporation if it "should fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter."

It is respectfully submitted that the refusal of the corporation to prosecute an appeal from the judgments was tantamount to its failure "diligently to prosecute the same thereafter" and conferred an absolute right upon appellant to be permitted to intervene for the purpose of appealing from the District Court's judgments.

POINT II.

This Court Has the Power to Review the District Court's Judgments Upon the Record Before It.

It is respectfully submitted that should this Court reverse the District Court's judgment which denied appellant's application to intervene, then it has the power on the record before it to treat appellant's appeal as though it were an appeal on the merits from the judgments entered below. (See *Park & Tilford, Inc. v. Schulte, supra.*)

In the Court below the actions against the individual appellees were "submitted for final decision by agreement of the parties upon the question of liability only, all matters with regard to damages and the measure thereof having been reserved for further proceedings." [R. pp. 85, 93-94, 102.]

The District Court made certain Findings of Fact which is conceded by appellant herein with the exception of one paragraph thereof (proper only as a conclusion of law) which states that "Plaintiff, by its actions herein, is estopped from recovering profits, if any, from the transactions of defendant in the stock of plaintiff under said option agreement which plaintiff initiated and set up and which plaintiff, at least inferentially, assured defendant to be valid." [R. pp. 89, 97-98, 106.]

The sole issue before this Court, therefore, is whether the District Court's Findings of Fact, the truth of which is conceded by appellant with the exception noted above, all of which are included in the record before this Court, entitled the individual appellees to judgments as a matter of law.

The individual appellees have fully argued this point in their brief and this Court can, therefore, properly review the judgments of the District Court.

POINT III.

Estoppel or Waiver Is Unavailable as a Defense to Appellees Under Section 16(b) of the Securities Exchange Act of 1934.

The Securities Exchange Act of 1934 was specifically enacted by Congress after protracted hearings for the protection of the public interest.

It has been held again and again both by the Courts and legal scholars that neither estoppel nor waiver is available as a defense to a statute enacted for the protection of a public interest.

In *Scott Paper Co. v. Marcalus Mfg. Co.,* 326 U. S. 249, 66 S. Ct. 101, 90 L. Ed. 47, rehearing denied, 326 U. S. 811, 66 S. Ct. 263, 90 L. Ed. 495, the Court said (p. 257):

> "* * * For no more than private contract can estoppel be the means of successfully avoiding the requirements of legislation enacted for the protection of a public interest. * * *"

Appellant's opening brief has fully set forth other cases to the same effect. The brief submitted by the Securities

and Exchange Commission persuasively argues this point and concurs in it.

Stripped of this equitable defense the District Court apparently found that "The hard rule of law might indicate that judgment should be rendered in favor of plaintiffs." [R. p. 83.]

It is respectfully submitted that the judgments of the court below should be reversed.

Conclusion.

The judgment of the District Court denying appellant's motion to intervene should be reversed and the judgments entered in the court below in favor of the individual appellees should be reversed on the merits.

Respectfully submitted,

KENNY & MORRIS,
By ROBERT W. KENNY,
Attorneys for Appellant.

MORRIS J. LEVY,
Of Counsel.

No. 13225

United States
Court of Appeals
for the Ninth Circuit.

CROFTON DIESEL ENGINE COMPANY, INC., a Corporation, and AL LARSON BOAT SHOP, a Corporation,

Appellants,

vs.

PUGET SOUND NATIONAL BANK OF TACOMA, a Corporation, and ETS-HOKIN & GALVAN,

Appellees.

Apostles on Appeal

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 13225

United States
Court of Appeals
for the Ninth Circuit.

CROFTON DIESEL ENGINE COMPANY, INC., a Corporation, and AL LARSON BOAT SHOP, a Corporation,

Appellants,

vs.

PUGET SOUND NATIONAL BANK OF TACOMA, a Corporation, and ETS-HOKIN & GALVAN,

Appellees.

Apostles on Appeal

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

NAMES AND ADDRESSES OF PROCTORS

For Appellants:

ARCH E. EKDALE, and
GORDON P. SHALLENBERGER,
614 S. Pacific Ave.,
San Pedro, Calif.

For Appellee Puget Sound National Bank of Tacoma:

CHARLES H. KENT, and
HERBERT R. LANDE,
413 West Seventh St.,
San Pedro, Calif.

For Appelee, Ets-Hokin & Galvin:

HANSEN & SWEENEY,
842 Title Insurance Bldg.,
433 S. Spring St.,
Los Angeles 13, Calif.

In the District Court of the United States, Southern District of California, Central Division

In Admiralty—No. 12,271-WM

PUGET SOUND NATIONAL BANK OF TACOMA, a National Banking Corporation,

Libelant,

vs.

AMERICAN OIL SCREW FLYING CLOUD, Her Engines, Tackle, Apparatus, Boats, Furniture and Equipment; and PETER RADIC and JOHN KREMENIC,

Respondents.

LIBEL—FORECLOSURE OF PREFERRED SHIP'S MORTGAGE

To the Honorable the Judges of the United States District Court for the Southern District of California:

The libel of Puget Sound National Bank of Tacoma, a national banking corporation of the State of Washington, against the American Oil Screw Flying Cloud, her engines, tackle, apparatus, boats, furniture and equipment, and Peter Radic and John Kremenic, in a cause, civil and maritime, of foreclosure of a preferred ship's mortgage in rem and in personam, alleges as follows:

I.

That the libelant at all times mentioned hereafter

was [2*] and now is a national banking corporation of the State of Washington.

II.

That the American Oil Screw Flying Cloud is now, or during the pendency of process herein will be, within the Southern District of California and within the jurisdiction of this Honorable Court; that the respondents, Peter Radic and John Kremenic, are at this time also within the jurisdiction of this Honorable Court.

III.

That on or before August 18, 1948, said Oil Screw Flying Cloud was documented under the laws of the United States at Tacoma, Washington, and was given Official Number 255,923; that said vessel was at said time and is now owned by the respondents, Peter Radic, owning 50%, and John Kremenic, owning 50%.

IV.

That on the 18th day of August, 1948, the said respondents, Peter Radic and John Kremenic, executed a promissory note to the libelant in the sum of $25,000.00; that said note bore interest at the rate of 5% per annum on the unpaid balance thereof until the same be paid; that said note was delivered to the libelant on or about August 18, 1948.

V.

That in order to secure the payment of the principal sum of said note with interest, and the amount

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

of both principal and interest, evidenced thereby, according to the true tenor and effect of said note, said respondents, Peter Radic and John Kremenic, the makers of said note, duly executed and delivered to the libelant, as mortgagee, a preferred ship's mortgage dated August 18, 1948.

VI.

That by the terms and provisions of said preferred ship's mortgage, the said Peter Radic and John Kremenic admitted that [3] they were justly indebted to the said mortgagee, the libelant, in the sum of $25,000.00, and granted, bargained, sold and mortgaged to the libelant the whole of the said Oil Screw Flying Cloud, together with all of the masts, boats, engines, anchors, cables, chains, rigging, tackle, furniture, and all other necessaries thereunto appertaining and belonging, provided, that if the said Peter Radic and John Kremenic should pay, or cause to be paid to the mortgagee, the libelant, said principal sum of $25,000.00, with interest thereon at the rate of 5% per annum in installments, and if the said mortgagors should perform all and singular the covenants and promises in said note and in the said mortgage, then the said mortgage and the rights therein granted should cease and be void, otherwise to remain in full force and effect; that the date of maturity of said note and mortgage, upon which date all unpaid sums of interest and principal became due and payable, was October 31, 1949.

VII.

That at the time said preferred mortgage was executed, the said oil screw Flying Cloud was and still is duly documented under the laws of the United States of America, having its home port at Tacoma, Washington.

VIII.

That the said preferred mortgage was duly filed for record in the Office of the Collector of Customs of the Port of Tacoma, State of Washington, the home port of said vessel, and was duly recorded in said Office of the Collector of Customs in Book P-2, Instrument No. 40, at 4:15 p.m. on August 19, 1948, which said record shows the name of the vessel, the names of the parties to the mortgage, the time and date of the reception of the mortgage, the interests in the vessel mortgaged, and the amount and date of maturity of the mortgage, in accordance with Section 30, Subsection "C," of the Merchant Marine Act of the [4] United States of June 5, 1920.

IX.

That said preferred mortgage was endorsed upon the document of the oil screw Flying Cloud in accordance with the provisions of said Section 30 of the Merchant Marine Act of June 5, 1920, and was recorded as provided by said Section 30, Subsection "C," of said Merchant Marine Act; that an affidavit was filed with the record of said mortgage to the effect that the mortgage was made in good faith and without any design to hinder, delay

or defraud any existing or future creditors of the mortgagors, or any lienor of the mortgaged vessel. The said mortgage did not stipulate that the mortgagee waived the preferred status thereof. That all of the acts and matters required to be done by the said Merchant Marine Act of June 5, 1920, in order to give to the said mortgage the status of a preferred mortgage, were done, either by your libelant or by the Collector of Customs of the Port of Tacoma, Washington.

X.

That libelant is informed and believes and therefore alleges that the Collector of Customs of the Port of Tacoma, Washington, upon the recording of said preferred mortgage, delivered two (2) certified copies thereof to the mortgagors, the said Peter Radic and John Kremenic, and that the said respondents placed and retained one copy of said mortgage on board the oil screw Flying Cloud and libelant is further informed and believes and therefore alleges that the Master thereof caused the said copy and the documents of the said vessel to be exhibited to any person having business with the vessel, which might give rise to a maritime lien upon the vessel, and libelant is also informed and believes and therefore alleges, that at all times since then the Master of said vessel upon the request of any such person, has exhibited to him the documents of the vessel and the copy of the said preferred [5] mortgage placed on board thereof.

XI.

That the said preferred mortgage stated the interests of the mortgagors in the oil screw Flying Cloud, and the interests conveyed or mortgaged, and before the same was recorded said mortgage had been acknowledged by said Peter Radic and John Kremenic before a Notary Public authorized by the laws of the State of Washington to take acknowledgments of deeds within the said State.

XII.

That on August 18, 1948, and ever since then, the libelant has been and is now the holder of the aforesaid note; that since October 31, 1949, the respondents have failed and refused to pay to the libelant the balance of principal and interest, as provided therein; that there is now due, owing and payable from the respondents Peter Radic and John Kremenic to the libelant, the sum of $20,-267.40 with interest thereon at the rate of 5% per annum from October 31, 1949; that libelant has demanded payment of said sum, but the respondents Peter Radic and John Kremenic have failed and refused to pay the same, or any part thereof.

XIII.

That the said preferred mortgage provided in part, that if default be made in any of the installments as provided in said promissory note, that the whole sum of principal and interest, without notice, shall become due at the option of the mortgage, and suit may be immediately brought to foreclose said

mortgage; that said preferred mortgage and note also provided, that if suit be brought to enforce payment of the sums due thereunder, the makers of said note and the mortgagors under said preferred mortgage agreed to pay a reasonable attorney's fee to the holder of the note, libelant herein, and that the said preferred mortgage was also given to secure the payment of any such sum.

For a Second Cause of Action, the libelant Puget Sound National Bank of Tacoma, a national banking corporation of the State of Washington, alleges as follows:

I.

Libelant refers to and incorporates herein Paragraphs I, II and III of the First Cause of Action herein.

II.

That on the 18th day of August, 1949, said respondents Peter Radic and John Kremenic executed a promissory note to the Kazulin Cole Shipbuilding Corporation in the sum of $10,000.00; that said note bore interest at the rate of 6% per annum on the unpaid balance thereof until the same be paid; that said note was delivered to Kazulin Cole Shipbuilding Corporation, on or about August 18, 1948.

III.

That in order to secure the payment of the principal sum of said note with interest, and the amount of both principal and interest, evidenced thereby, according to the true tenor and effect of said note,

said respondents Peter Radic and John Kremenic, the makers of said note, duly executed and delivered to the Kazulin Cole Shipbuilding Corporation, as mortgagee, a preferred ship's mortgage, dated August 18, 1949.

IV.

That by the terms and provisions of said preferred ship's mortgage, the said Peter Radic and John Kremenic admitted that they were justly indebted to the said mortgagee, Kazulin Cole Shipbuilding Corporation, in the sum of $10,000.00 and granted, bargained, sold and mortgaged to the Kazulin Cole Shipbuilding Corporation the whole of said oil screw Flying Cloud, together with all of the masts, boats, engines, anchors, cables, chains, rigging, tackle, furniture and all other necessaries thereunto appertaining and belonging, provided, that if the said Peter Radic and John [7] Kremenic should pay, or cause to be paid to the mortgagee, Kazulin Cole Shipbuilding Corporation, said principal sum of $10,000.00, with interest thereon at the rate of 6% per annum in installments, and if the said mortgagors should perform all and singular the covenants and promises in said note and in the said mortgage, then the said mortgage and the rights therein granted should cease and be void; otherwise to remain in full force and effect; that the date of maturity of said note and mortgage, upon which date all unpaid sums of interest and principal became due and payable, was November 30, 1949.

V.

That at the time said preferred mortgage was executed, the said oil screw Flying Cloud was and still is duly documented under the laws of the United States of America, having its home port at Tacoma, Washington.

VI.

That the said preferred mortgage was duly filed for record in the Office of the Collector of Customs of the Port of Tacoma, State of Washington, the home port of the said vessel, and was duly recorded in said Office of the Collector of Customs in Book P-2, Instrument No. 41, at 4:20 p.m., on August 19, 1948, which said record shows the name of the vessel, the names of the parties to the mortgage, the time and date of the reception of the mortgage, the interests in the vessel mortgaged, and the amount and date of maturity of the mortgage, in accordance with Section 30, Subsection "C" of the Merchant Marine Act of the United States of June 5, 1920.

VII.

That said preferred mortgage was endorsed upon the document of the oil screw Flying Cloud in accordance with the provisions of said Section 30 of the Merchant Marine Act of June 5, 1920, and was recorded as provided by said Section 30, Subsection [8] "C" of said Merchant Marine Act; that an affidavit was filed with the record of said mortgage to the effect that the mortgage was made in good faith and without any design to hinder, delay or defraud any existing or future creditors of the

mortgagors, or any lienor of the mortgaged vessel. The said mortgage did not stipulate that the mortgagee waived the preferred status thereof. That all of the acts and matters required to be done by the said Merchant Marine Act of June 5, 1920, in order to give to the said mortgage the status of a preferred mortgage, were done, either by Kazulin Cole Shipbuilding Corporation or by the Collector of Customs of the Port of Tacoma, Washington.

VIII.

That libelant is informed and believes, and therefore alleges, that the Collector of Customs of the Port of Tacoma, Washington, upon the recording of said preferred mortgage, delivered two (2) certified copies thereof to the mortgagors, the said Peter Radic and John Kremenic, and that the respondents Peter Radic and John Kremenic placed and retained one copy of said mortgage on board the oil screw Flying Cloud and libelant is further informed and believes, and therefore alleges, that the Master thereof caused the said copy and the documents of the said vessel to be exhibitd to any person having business with the vessel, which might give rise to a maritime lien upon the vessel, and libelant is also informed and believes, and therefore alleges, that at all times since then the Master of said vessel, upon the request of any such person, has exhibited to him the documents of the vessel and the copy of the said preferred mortgage placed on board thereof.

IX.

That the said preferred mortgage stated the interests of the mortgagors in the oil screw Flying Cloud, and the interests conveyed or mortgaged, and before the same was recorded said mortgage had been acknowledged by said Peter Radic and [9] John Kremenic before a Notary Public authorized by the Laws of the State of Washington to take acknowledgments of deeds within the said State.

X.

That on October 19, 1949, the said Kazulin Cole Shipbuilding Corporation by an instrument in writing, assigned said note and mortgage to the libelant; that said assignment was recorded with the Collector of Customs at Tacoma, Washington, on March 23, 1950, at 9:00 a.m., in Book P-2, Instrument No. 137; that on said date of October 19, 1949, and ever since then, the libelant has been and now is the holder of the aforesaid note; that since November 30, 1949, the respondents have failed and refused to pay to the libelant the principal and interest as provided therein; that there is now due, owing and payable from the respondents to the libelant the sum of $10,000.00 with interest thereon at the rate of 6% per annum from November 30, 1949; that libelant has demanded payment of said sum, but the respondents Peter Radic and John Kremenic have failed and refused to pay the same, or any part thereof.

XI.

That the said preferred mortgage provided in part, that if default be made in any of the install-

ments as provided in said promissory note, that the whole sum of principal and interest, without notice, shall become due at the option of the mortgagee, and suit may be immediately brought to foreclose said mortgage; that said preferred mortgage and note also provided, that if suit be brought to enforce payment of the sums due thereunder, the makers of said note and the mortgagors under said preferred mortgage agreed to pay a reasonable attorney's fee to the holder of the note, and that the said preferred mortgage was also given to secure the payment of any such sum. [10]

XII.

That the said preferred mortgage provided inter alia, that if insurance be not maintained by the owners thereof, that the mortgagee should obtain said insurance at the expense of the mortgagors and that the sum so expended by the mortgagee should be repaid by the mortgagors, and that the said mortgage should be security therefor; that the mortgagors did permit the insurance to lapse on said vessel, and the mortgagee has procured insurance therefor; that the cost of said insurance has not as yet been determined and therefore mortgagee and libelant herein ask leave to prove, and if required by the Court, to amend this Libel, to show the sums expended for such insurance, no part of which has been repaid by the mortgagors.

Wherefore, libelant prays:

(1) That process in due form of law, according to the course and practice of this Court in causes

of admiralty and maritime jurisdiction, may issue against the oil screw Flying Cloud, her engines, tackle, apparel, boats, furniture and equipment, and that all persons claiming any interest in the said vessel may be cited to appear and answer the matters aforesaid, and that the oil screw Flying Cloud, her engines, tackle, apparel, boats, furniture and equipment, may be condemned and sold to pay the demands and claims aforesaid, with interest and costs, and to pay a reasonable attorney's fee to libelant, and any and all other amounts including insurance premiums required to be paid by the mortgagors to the mortgagee and libelant under said preferred mortgage with interest and costs;

(2) That process in due form of law, according to the course and practice of this Court in causes of admiralty and maritime jurisdiction, may issue against the respondents Peter Radic and John Kremenic, citing each of them to [11] appear and answer the allegations aforesaid; and that the Court be pleased to give libelant a decree against the said respondents, and each of them, in the sum of $30,267.40 with interest, together with a reasonable allowance for attorney's fees to libelant, repayment of insurance premiums advanced, with interest and costs;

(3) That the aforesaid preferred mortgages be declared to be a valid and subsisting first and second liens upon the said oil screw Flying Cloud, her engines, tackle, apparel, boats, furniture and equipment, prior and superior to the interests, liens or

claims of any and all persons, firms or corporations whatsoever, except such persons, firms or corporations as may hold preferred maritime liens on the said vessel;

(4) That in default of the payment of the sums found to be due and payable to the libelant under the said preferred mortgage, within a time to be limited by a decree of this Honorable Court, together with interest, and costs, it may be decreed that any and all persons, firms and corporations claiming any interest in the said vessel Flying Cloud, her engines, tackle, apparel, boats, furniture and equipment, are forever barred and foreclosed of and from all right or equity of redemption, or claim of, in or to the said Oil Screw Flying Cloud, her engines, tackle, apparel, boats, furniture and equipment, and every part thereof;

(5) That this Honorable Court shall direct the manner in which actual notice of the commencement of this suit shall be given by the libelant to the Master of the vessel Flying Cloud, and to any person, firm or corporation who has recorded a notice of claim of an undischarged lien upon the vessel, as provided in Sections 925 and 951 of Title 46, U. S. Code.

CHARLES H. KENT, and

HERBERT R. LANDE,

By /s/ CHARLES H. KENT,

Proctors for Libelant. [12]

State of California,
County of Los Angeles—ss.

Charles H. Kent, being first duly sworn, on oath, deposes and says:

That he is one of the proctors for the libelant in the above-entitled cause who is a party herein; that he has read the foregoing Libel—Foreclosure of Preferred Ship's Mortgage and that he believes it to be true; that said libelant is a national banking corporation with its principal place of business at Tacoma, Washington, and is absent from and is a non-resident of the State of California and County of Los Angeles, in which said suit is brought, and that affiant makes this affidavit and verification for the reason that libelant is absent from and is a non-resident of said County of Los Angeles and State of California in which said action is brought.

Dated September 13, 1950.

/s/ CHARLES H. KENT,
Of Counsel for Libelant.

Subscribed and sworn to before me this 13th day of September, 1950.

[Seal] /s/ RUTH STUART,
Notary Public, in and for the County of Los Angeles, State of California.

My Commission expires October 4, 1952.

[Endorsed]: Filed September 14, 1950. [13]

In the District Court of the United States, Southern District of California, Central Division

In Admiralty No. 12271-WM

PUGET SOUND NATIONAL BANK OF TACOMA, a National Banking Corporation,
Libelant,

vs.

AMERICAN OIL SCREW FLYING CLOUD, HER ENGINES, TACKLE, APPARATUS, BOATS, FURNITURE AND EQUIPMENT; and PETER RADIC and JOHN KREMENIC,
Respondents.

CROFTON DIESEL ENGINE COMPANY, INC., a California Corporation; and AL LARSON BOAT SHOP, a California Corporation,
Interveners,

vs.

AMERICAN OIL SCREW FLYING CLOUD, HER ENGINES, TACKLE, APPARATUS, BOATS, FURNITURE AND EQUIPMENT; and PETER RADIC and JOHN KREMENIC,
Respondents.

LIBEL IN INTERVENTION TO FORECLOSE PREFERRED MORTGAGE, AND LIBEL IN INTERVENTION FOR SUPPLIES AND MATERIALS [14]

To the Honorable, the Judges of the United States District Court, for the Southern District of California, Central Division:

The Libel in Intervention of Crofton Diesel Engine Company, Inc., a California corporation, to foreclose preferred mortgage, and the Libel in Intervention of Al Larson Boat Shop, a California corporation, for supplies and materials, against the American Oil Screw Flying Cloud, her engines, tackle, apparatus, boats, furniture and equipment, and Peter Radic and John Kremenic, in a cause, civil and maritime, alleges as follows:

For a First Cause of Action Against the American Oil Screw Flying Cloud, Her Engines, Tackle, Apparatus, Boats, Furniture and Equipment, and Peter Radic and John Kremenic, and Against All Persons Intervening for Their Interests Herein, Intervener Crofton Diesel Engine Company, Inc., Alleges as Follows:

I.

That the Intervener, Crofton Diesel Engine Company, Inc., is a California corporation, authorized to do and is doing business in the County of Los Angeles and County of San Diego, State of California, and within the jurisdiction of this Honorable Court.

II.

That the Respondents, Peter Radic and John Kremenic, are residents within the jurisdiction of this Honorable Court, and that the American Oil Screw Flying Cloud is now, and during the pendency of the action herein, will be within the Southern District of California, and within the jurisdiction of this Honorable Court.

III.

That on or about the 9th day of May, 1950, the said American Oil Screw Flying Cloud, Official No. 255,923, was owned by Peter Radic and John Kremenic. [15]

IV.

That on or about the 9th day of May, 1950, said Peter Radic and John Kremenic executed the following promissory note:

"Mortgage Note

"$6,500.00

"San Pedro, California
"May 9, 1950

"On or before May 1, 1952, for value received, the undersigned, jointly and severally, promise to pay to Crofton Diesel Engine Company, a corporation, or order, at Foot of G Street, Fishermen's Wharf, San Diego, California, the principal sum of Six Thousand Five Hundred and No/100 Dollars ($6,500.00) with interest thereon at the rate of six per cent (6%) per annum. Principal payable in lawful money of the United States.

"If action be instituted on this note, the undersigned promise to pay such sum as the Court may fix as attorneys' fees.

"Extension of the time of payment of all or any part of the amount owing hereon at any time or times shall not affect the liability of any party hereto or surety or guarantor hereof.

"This note is secured by a Third Preferred

Ship's Mortgage on the Oil Screw Vessel Flying Cloud, Official No. 255,923.

"/s/ PETER RADIC.

"/s/ JOHN KREMENIC."

That on or about the said date said note was delivered to Crofton Diesel Engine Company, Inc., the payee thereof.

V.

That in order to secure the payment of the principal of said note according to the true tenor and effect of said note, the mentioned Peter Radic and John Kremenic, jointly and severally, duly executed and delivered to the Intervener, Crofton Diesel Engine [16] Company, Inc., as Mortgagee, a Third Preferred Mortgage dated the 9th day of May, 1950, and recorded in the Office of Collector of Customs in the District of Tacoma, at the Port of Tacoma, Washington, on the 29th day of May, 1950, at 4:55 o'clock p.m., and recorded in Liber P/2 of mortgages, folio 159, etc. A full, true and correct copy of said preferred mortgage and note is attached hereto, marked Exhibit "A," and by this reference made a part hereof, and Intervener, Crofton Diesel Engine Company, Inc., begs leave to refer to the said preferred mortgage for all of the terms, provisions and conditions therein contained as though the same were set forth herein at length.

VI.

That by the terms and provisions of said preferred mortgage, the mentioned Peter Radic and

John Kremenic, jointly and severally, admit that they were justly indebted to said mortgagee in the sum of Six Thousand Five Hundred and No/100 Dollars ($6,500.00), and granted, bargained, sold, conveyed, transferred, assigned, remised, released, mortgaged, set over, and confirmed unto the mortgagee, its successors and assigns, the whole of said vessel, together with her engines, boilers, machinery, masts, bowsprits, boats, anchors, cables, riggings, tackle, apparel, furniture, nets and fishing gear, and all other appurtenances thereunto belonging and appertaining, and any and all additions, improvements and replacements thereafter made in or to the said vessel or any part or appurtenance or equipment thereof, provided, that if the mentioned Peter Radic and John Kremenic, their heirs, administrators and assigns, should pay or cause to be paid to the said mortgagee, its successors and assigns, the principal sum of Six Thousand Five Hundred and No/100 Dollars ($6,500.00), with interest thereon in accordance with the terms and conditions of said promissory note, and if the mentioned Peter Radic and John Kremenic should keep, perform and observe all and singular the covenants and promises in [17] the said note and in the said mortgage, then the said mortgage and the estate and rights thereby granted should cease, determine and be void, otherwise to remain in full force and effect.

VII.

That at the time the said preferred mortgage was executed the said Oil Screw Vessel Flying Cloud

was and she still is duly enrolled and/or documented under the laws of the United States of America, having her home port at the Port of Tacoma, Washington. That the Official Number of said Oil Screw Vessel Flying Cloud is 255,923, and that said vessel was and is of about 65 gross tons, and 29 net tons register.

VIII.

That said preferred mortgage was duly filed for record in the Office of the Collector of Customs of the Port of Tacoma, Washington, the home port of the said Vessel and the port nearest the residence of the owners of said vessel, and was duly recorded in said Office of the Collector of Customs in Liber P/2 of mortgages, folio 159, at 4:55 o'clock p.m., on the 29th day of May, 1950, which said record shows the name of the vessel, the names of the parties to the mortgage and the time and date of the reception of the mortgage for record, the interest in the vessel mortgaged and the amount and date of the maturity of the mortgage, as provided by the laws of the United States.

IX.

That said preferred mortgage was endorsed upon the document of said Vessel Flying Cloud in accordance with the provisions of the laws of the United States. That an affidavit was filed with the record of said mortgage to the effect that said mortgage was made in good faith and without any design to hinder, delay or defraud any existing or future creditor

of the mortgagors or any lienor of the mortgaged vessel. That the said preferred mortgage did not stipulate that the mortgagee waived the preferred status [18] thereof. That all of the acts and things required to be done by the laws of the United States, and specifically by the Act of June 5, 1920, 41 Stat. 1000, in order to give to the said mortgage the status of a preferred mortgage were duly done or caused to be done either by the mortgagee named in said mortgage or by the Collector of Customs of the Port of Tacoma, Washington.

X.

That the Collector of Customs of the Port of Tacoma, Washington, upon the recording of said preferred mortgage, delivered two certified copies thereof to the mortgagors, the said Peter Radic and John Kremenic, who placed and used due diligence to retain one copy on board said Vessel Flying Cloud and caused the said copy and the documents of the said vessel to be exhibited by the master thereof to any person having business with said Vessel which might give rise to a maritime lien upon such vessel, or to the sale, conveyance or mortgage thereof; and at all times since then the master of said vessel, upon the request of any such person, has exhibited to him the documents of said vessel and the copy of said preferred mortgage placed on board thereof.

XI.

That said preferred mortgage stated the interest of the mortgagors in said Vessel Flying Cloud and

the interest conveyed or mortgaged, and before the same was recorded said mortgage had been acknowledged in the County of Los Angeles, State of California, before a Notary Public authorized by the laws of the State of California to take acknowledgements of deeds within said County of Los Angeles, State of California.

XII.

That Article XIV of said preferred mortgage provides in part as follows:

> "In the event of Mortgagor.. default of prompt and [19] punctual payment when due in the payment of any interest or principal sum on said note.., and any such default shall continue for fifteen (15) days, * * *
>
> "Then in every such case the entire principal sum and/or said note.. with interest shall be immediately due and payable at Mortgagee.. option with prior notice. * * *
>
> "Mortgagee.. shall have the right to bid or purchase said vessel."

XIII.

That no payment has been made in the payment of interest and principal due to the Intervener, Crofton Diesel Engine Company, Inc., on the mentioned note described in Paragraph IV hereof, and that as of the date hereof there is due, owing and unpaid on account of the principal under the terms of said note and/or mortgage the total sum of Six Thousand Five Hundred and No/100 Dollars

($6,500.00), together with interest from the 9th day of May, 1950, at the rate of six per cent (6%) per annum, the Intervener, Crofton Diesel Engine Company, Inc., having elected, pursuant to the option granted by the terms of said mortgage, to treat the entire sum of principal and interest now payable under the terms of said note as due and payable by reason of default in the payment of the note after due demand on the makers of said note. That although demand has been duly made for the payment of said principal and interest upon said Peter Radic and John Kremenic, the makers of said note and mortgage, no payment of all or any part of the amount due thereon, as hereinbefore alleged, has been made, and that there is now due, owing and unpaid on the said note as of the date hereof to the Intervener, Crofton Diesel Engine Company, Inc., the sum of Six Thousand Five Hundred and No/100 Dollars ($6,500.00), together with interest from the 9th day of May, 1950, at the rate of six per cent (6%) per annum.

XIV.

That Article XVI of said preferred mortgage provides in [20] part as follows:

"Proceeds from any sale shall be applied as follows:

"First: To pay charges of sale, including expenses of retaking.

"Second. Attorney's fees and costs.

"Third. Payment of unpaid balance of prin-

cipal and interest on said note.., and advances made by Mortgagee...

"Fourth. Any surplus to Mortgagor... If insufficient funds are realized to satisfy the sums set out above, Mortagor.. shall forthwith pay Mortgagee.. the amount of such deficiency."

XV.

That pursuant to the provisions of Article XVI thereof, Intervener, Crofton Diesel Engine Company, Inc., has employed the services of attorneys and proctors, to wit: Ekdale & Shallenberger, and has incurred an obligation for attorneys' fees in a reasonable amount, said amount to be found by the Court and ordered paid accordingly.

For a Second Cause of Action Against the American Oil Screw Flying Cloud, Her Engines, Tackle, Apparatus, Boats, Furniture and Equipment, and Peter Radic and John Kremenic, and Against All Persons Intervening for Their Interests Herein, Intervener, Al Larson Boat Works, Alleges as Follows:

I.

That the Intervener, Al Larson Boat Works, is a California corporation, authorized to do and is doing business in the County of Los Angeles, State of California, and within the jurisdiction of this Honorable Court.

II.

That the Respondents, Peter Radic and John Kremenic, are [21] residents within the jurisdic-

tion of this Honorable Court, and that the American Oil Screw Flying Cloud is now, and during the pendency of the action herein, will be within the Southern District of California, and within the jurisdiction of this Honorable Court.

III.

That on or about the 20th day of October, 1949, the said American Oil Screw Flying Cloud, Official No. 255,923, was owned by Peter Radic and John Kremenic.

IV.

That prior to the time of the taking of the note and mortgage set forth in the First Cause of Action of the Libel in Intervention of Crofton Diesel Engine Company, Inc., to wit, on or about the 20th day of October, 1949, at the special instance and request of the Master, Owners and agents of the said American Oil Screw Flying Cloud, the Intervener, Al Larson Boat Shop, performed work and labor on and furnished goods, wares and materials to the said Vessel Flying Cloud, in the total sum of One Thousand Seventy-Seven and 73/100 Dollars ($1,077.73); that though demand has been made upon the respondent Oil Screw, her Master, Owners and agents, for the said sum of One Thousand Seventy-Seven and 73/100 Dollars ($1,077.73), no part thereof has been paid, and there remains due, owing and unpaid the sum of One Thousand Seventy-Seven and 73/100 Dollars ($1,077.73), together with interest thereon from the 20th day of October, 1949, at the rate of seven per cent (7%) per annum.

V.

That after the time of the taking of the note and mortgage set forth in the First Cause of Action of the Libel in Intervention of Crofton Diesel Engine Company, Inc., to wit, on or about the 18th day of July, 1950, at the special instance and request of the Master, Owners and agents of the said American Oil Screw Flying Cloud, the Intervener, Al Larson Boat Shop, performed work and [22] labor on and furnished goods, wares and materials to the said Vessel Flying Cloud, in the total sum of Two Thousand One Hundred Twenty and 03/100 Dollars ($2,120.03); that though demand has been made upon the respondent Oil Screw, her Master, Owners and agents, for the said sum of Two Thousand One Hundred Twenty and 03/100 Dollars ($2,120.03), no part thereof has been paid, and there remains due, owing and unpaid the sum of Two Thousand One Hundred Twenty and 03/100 Dollars ($2,120.03), together with interest thereon from the 18th day of July, 1950, at the rate of seven per cent (7%) per annum.

VI.

That all and singular, the premises of the within Libel in Intervention, and each of the separate causes of action set forth herein are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, Interveners pray:

1. That process in due form of law, according

to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction issue against the said Oil Screw Vessel Flying Cloud, Official No. 255,923, her engines, boilers, machinery, tackle, apparel, boats, equipment, and furniture in rem, and Peter Radic and John Kremenic, in personam, and that all persons claiming any interest in the said vessel may be cited to appear and answer to the matter aforesaid, and that the said vessel, her engines, boilers, machinery, tackle, apparel, boats, equipment, and furniture, nets and fishing gear, be condemned and sold to pay the debts and claims of aforesaid, with interest and costs, and to pay any and all other amounts required to be paid by the mortgagors to the Intervener, Crofton Diesel Engine Company, Inc., as Mortgagee under the said preferred mortgage in accordance with the terms and [23] provisions of said mortgage, together with interest, costs and proctors' fees, and to pay any and all other amounts required to be paid by the respondents to the Intervener, Al Larson Boat Shop, for the labor and materials furnished, together with interest, costs and proctors' fees; that if the proceeds of such sale shall be insufficient to pay the same, a deficiency judgment be entered against the respondents, Peter Radic and John Kremenic, and that Interveners may have such other and further relief as in law and justice they may be entitled to receive.

2. That the said preferred mortgage dated the 9th day of May, 1950, be declared to be a valid and subsisting lien upon said Vessel Flying Cloud, her

engines, boilers, machinery, tackle, apparel, boats, equipment and furniture, nets and fishing gear, prior and superior to the interests, liens or claims of any and all persons, firms or corporations whatsoever.

3. That in default of the payment of the sum found to be due and payable to your Intervener, Crofton Diesel Engine Company, Inc., under the said mortgage within the time to be limited by decree of this Honorable Court, together with interest at seven per cent (7%) per annum on the unpaid principal of the note hereinabove described from the date of filing, together with a sum sufficient to pay the costs of this suit and such fees of counsel for Interveners as the Court may find reasonable, it being decreed that any and all persons, firms or corporations claiming any interest in the said Vessel Flying Cloud are forever barred and foreclosed of and from all right or equity or redemption or claim in or to the said mortgaged vessel Flying Cloud, and every part thereof.

4. That your Interveners be permitted to use and apply the amounts to which your Interveners are adjudged to be entitled by the decree herein, upon and as a part of the amount which they may elect to bid for said vessel at any sale thereof decreed by this Court. [24]

5. That the sum of One Thousand Seventy-Seven and 73/100 Dollars ($1,077.73), together with interest thereon from the 20th day of October, 1949, at the rate of seven per cent (7%) per annum, and

costs thereon, be declared to be a valid and subsisting lien prior to the mortgage and note set forth in this Libel in Intervention.

6. That the Court fix and determine the priority of payments, and the order of payments, as between the Libelants and the Interveners herein, and will be pleased in that behalf to declare due and owing to the Intervener, Al Larson Boat Shop, the sum of One Thousand Seventy-Seven and 73/100 Dollars ($1,077.73), and declare due and owing to the Intervener, Crofton Diesel Engine Company, Inc., the sum of Six Thousand Five Hundred and No/100 Dollars ($6,500.00), together with interest, costs and reasonable attorneys' fees.

7. That Intervener, Al Larson Boat Shop, be entitled to receive the remnants and surplus up to and including the sum of Two Thousand One Hundred Twenty and 03/100 Dollars ($2,120.03), together with interest and costs.

8. That this Honorable Court direct the manner in which actual notice of the commencement of this suit shall be given by your Interveners to the mortgagors, and to the master or other ranking officer or caretaker of said Vessel Flying Cloud and to any person, firm or corporation who has recorded a notice of claim of any undischarged lien upon the vessel as provided by the laws of the United States.

EKDALE &
SHALLENBERGER,

By /s/ ARCH E. EKDALE,
Proctors for Interveners. [25]

Third
Preferred Mortgage

This Mortgage, made this 9th day of May, 1950, between Peter Radic, Route 5, Box 814, Tacoma, Washington, and John Kremenic, Route 5, Box 814, Tacoma, Washington, Mortgagors, parties of the first part, and Crofton Diesel Engine Company, Inc., a corporation, Foot of G Street, Fishermen's Wharf, San Diego, California, Mortgagee, party of the second part:

Witnesseth:

Whereas, the Mortgagors are the sole owners of the vessel Flying Cloud, Official No. 255,923;

Whereas, the Mortgagors are justly indebted to the Mortgagee in the sum of Six Thousand Five Hundred and No/100 Dollars ($6,500.00), and to secure the payment of said thereof with interest, has executed and delivered this preferred mortgage and note to the Mortgagee;

Now, Therefore, This Mortgage Witnesseth:

That in consideration of the premises and of the sum of One Dollar ($1.00) to them duly paid by the Mortgagee, receipt whereof is hereby acknowledged, and in order to secure the payment of the said principal sum of Six Thousand Five Hundred and No/100 Dollars ($6,500.00), and interest thereon at the rate of six per cent (6%) per annum, and the payment of any advancements that shall hereafter be made, and of the said note and the performance of all the covenants and conditions herein, the Mort-

gagors have granted, bargained, sold, conveyed, transferred, assigned, remised, released, mortgaged, set over, and confirmed and by these presents do grant, bargain, sell, convey, transfer, assign, remise, release, mortgage, set over, and confirm unto the Mortgagee, its assigns.

(Fill in "its successors and assigns" if corporation; if an individual, "His heirs, administrators and assigns"), all of the following:

That certain vessel called Flying Cloud (Date of maturity: On or before May 1, 1952), [26] Official Number 255,923, of 29.— net tons register, and 65.— gross tons register, which said vessel is, more fully described in consolidated certificate of enrollment and license, together with all her engines, boilers, machinery, masts, bowsprits, boats, anchors, cables, rigging, tackle, apparel, furniture, nets and fishing gear, and all other appurtenances thereunto belonging and appertaining, and any and all additions, improvements, and replacements hereafter made in or to the said vessel or any part or appurtenance or equipment thereof:

To Have and to Hold all the property aforesaid unto the Mortgagee, its assigns, forever;

Provided, However, and these presents are upon the condition that if the Mortgagors, their heirs, administrators, and assigns, shall pay or cause to be paid to the Mortgagee, its assigns, the said principal sum of Six Thousand Five Hundred and No/100 Dollars ($6,500.00), with interest thereon in accordance with the terms and conditions of said promissory note, and shall pay any and all advances

hereafter made to them by the Mortgagee, and shall keep, perform, and observe all and singular the covenants and promises in said note and in these presents expressed to be kept, performed, and observed by or on the part of the Mortgagors, then this mortgage and the estate hereby granted shall cease, determine, and be void, otherwise to remain in full force and effect.

The aforesaid note is as follows:

Exhibit "A" attached hereto and made a part hereof.

The Mortgagors hereby agree to pay the principal amount aforesaid, and the interest thereupon as stipulated and to fulfill, perform, and observe each and every one of the covenants, agreements, and conditions in this mortgage and in said note contained.

The Mortgagors, for their heirs, administrators, and assigns hereby covenant and agree with the Mortgagee as follows:

Article I.
[Struck out]

Article II.

That the Mortgagors lawfully own and are lawfully possessed of the mortgaged property, and the Mortgagors covenant and promise that they will warrant and defend the title and possession thereto and every part thereof for the benefit of the Mortgagee against the claims and demands of all persons whomsoever; and further warrants that there are

no liens, mortgage or mortgages on said vessel, except First Preferred Mortgage in favor of The Puget Sound National Bank of Tacoma, and Second Preferred Mortgage in favor of Kazulin Cole Shipbuilding Corporation of Tacoma.

Article III.

That the Mortgagors, at their own cost and expense as long as the said principal sum or the said note hereunder and hereby secured or any portion thereof is outstanding, shall keep the vessel insured in an amount in Dollars lawful money of the United States which shall be at least equal to its full commercial value but not in any case for less than One Hundred Per Cent (100%) of the amount remaining unpaid on said principal sum and on said note.

(a) This said insurance shall be placed with responsible Underwriters in good standing and satisfactory to the Mortgagee and in such form or policies and for such form or policies and for such risks as Mortgagee approves.

(b) All said policies and/or binders and/or cover notes and/or riders shall be delivered to the Mortgagee.

(c) All insurance shall be taken out in the name of and payable as the interest of the parties hereto may appear.

(d) All losses shall be payable to the Mortgagee for distribution by it within thirty (30) days after receipt of same, first to the Mortgagee and then to the Mortgagors as their interests may appear, save that in the case of a total loss the Mortgagee may

consent that the Underwriters pay direct to the Mortgagors the [27] amount by which the total loss insurance exceeds the total amount then due to the Mortgagee under this Mortgage or note. In the event of partial loss, if the Mortgagors are not in default under this Mortgage, the Mortgagee shall consent that the Underwriters pay direct for repairs, salvage or other charges and/or reimburse the Mortgagors therefore; but if the Mortgagors are in default under this Mortgage, the Mortgagee shall be entitled to receive the proceeds of any such insurance and shall apply such proceeds in the manner provided in Article XVIII hereof.

(e) Said policy or policies shall not be cancelled, amended or modified without Mortgagee's consent.

(f) In the event Mortgagors fail to obtain said insurance, then the Mortgagee, at its sole option, may do so and charge same to the account of the Mortgagors.

Article IV.

That the Mortgagors shall not do any act or voluntarily suffer or permit any act to be done whereby any insurance is or may be suspended, impaired or defeated and shall not suffer or permit the vessel to engage in any voyage or to carry any cargo not permitted under the policy or policies of insurance in effect, unless and until the Mortgagors shall first cover the vessel to the amount herein provided for by insurance, satisfactory to the Mortgagee for such voyage or the carriage of such cargo.

Article V.

That neither the Mortgagors nor the master of the vessel shall have any right, power, or authority to create, incur, or permit to be placed or imposed upon the vessel any liens whatsoever other than for crew's wages, wages of stevedores and salvage. The Mortgagors shall carry a properly certified copy of this mortgage with the ship's papers and shall exhibit the same to any person having business with the said vessel which might give rise to any lien other than for crew's or stevedore's wages and salvage.

Article VI.

That the Mortgagors shall place and keep prominently in the chart room and the master's cabin framed printed notices reading as follows:

"This vessel is covered by a third preferred mortgage to Crofton Diesel Engine Company, Inc., a corporation, San Diego, California (Foot of G Street, Fishermen's Wharf), under authority of the 'Ship Mortgage Act, 1920,' and amendments thereto, to secure payment to Crofton Diesel Engine Company, Inc., a corporation, San Diego, California (Foot of G Street, Fishermen's Wharf). Under the terms of said mortgage neither the Mortgagors, nor the Master of the Vessel has any right, power, or authority to create, incur, or permit to be imposed upon the vessel any liens whatsoever other than for crew's wages, wages of stevedores, or salvage."

Article VII.

That if a libel shall be filed against the vessel or

if the vessel shall be seized or taken into custody or sequestered by virtue of any legal proceedings in any court, the Mortgagors shall within ten (10) days thereafter cause the said vessel to be released and discharged, but this article shall not be construed as a waiver of Articles IV and V.

Article VIII.

That at all times the Mortgagors shall maintain and preserve the vessel in as good condition, working order, and repair, as at the date of the execution of this mortgage, ordinary wear and tear and depreciation excepted. Mortgagee shall have right of inspection at any time.

Article IX.

That the Mortgagors shall pay and discharge, when due and payable from time to time, all taxes, assessments, penalties, and governmental charges imposed upon the said vessel, her tackle, etc., subject, or to become subject, to this mortgage.

Article X.

That if the Mortgagors shall make default in the performance of any of the covenants in this mortgage on their part to be performed, the Mortgagee may, in its discretion, do any act or make any expenditure necessary to remedy such default, including, without limitation of the foregoing, entry upon the vessel to make repairs, and the Mortgagors shall promptly reimburse the Mortgagee, with interest at the rate of six per centum (6%) per annum, for any and all expenditures so made or incurred; and

until the Mortgagors so reimbursed the Mortgagee for such expenditures the amount thereof shall be added to the amount of the debt secured by this mortgage, and shall be secured by this mortgage in like manner and extent as if the amount and description thereof were written herein; but the Mortgagee though privileged so to do, shall be under no obligation to the Mortgagors to make such expenditures nor shall the making thereof relieve the Mortgagors of any default in that respect. The Mortgagors shall also reimburse the Mortgagee promptly with interest at the rate of six per centum (6%) per annum for any and all advances, expenses, and [28] attorney fees made or incurred by the Mortgagee at any time, and for any and all damages sustained by the Mortgagee from or by reason of any default of the Mortgagors.

Article XI.

That until default shall have been made in the performance by the Mortgagors of any of the terms, conditions, covenants, and promises herein contained, the Mortgagors may retain and possess the vessel and may use and operate the same.

Article XII.

That the Mortgagors shall comply with and satisfy all the provisions of the "Ship Mortgage Act, 1920," and all amendments thereto, and shall establish and maintain this mortgage as a first preferred mortgage under said Act and amendments, and the Mortgagors shall not sell, mortgage, transfer nor

change the flag of the vessel without the written consent of the Mortgagee.

Article XIII.

In case of default the Mortgagee shall be entitled to exercise the right of entry and retaking of said vessel and appurtenances and equipment without legal process, and with any and all other rights, privileges, and powers herein granted and conferred.

Article XIV

In the event of Mortgagors' default of prompt and punctual payment when due in the payment of any interest or principal sum on said note, and any such default shall continue for fifteen (15) days, or if default shall be made hereunder by the Mortgagors in the observance or performance of any other of the covenants, agreements, or conditions in this mortgage contained on their part to be observed and performed, and said default shall continue for fifteen (15) days; or if the Mortgagors are adjudged bankrupt, or if a receiver be appointed, or if the Mortgagors shall make a general assignment for the benefit of creditors, or if the said vessel shall be libeled or levied upon, taken into custody, or sequestered by virtue of any legal proceedings and such legal proceedings are not vacated or set aside and the said property released within fifteen (15) days or if the Mortgagor shall remove or attempt to remove the said property subject or to become subject to this mortgage beyond the limits of the United States, except on voyages with the intention of returning the said property

to the United States, then in every such case the entire principal sum and/or said note with interest shall be immediately due and payable at Mortgagee option without prior notice. Nothing in this article shall be deemed a waiver of the provisions of Articles IV and V. If such sums are not paid forthwith, Mortgagee may take possession of said vessel, her tackle, equipment, etc., without process of law, and Mortgagors may forthwith surrender possession to Mortgagee, who may sell the same at public or private sale after ten (10) days' notice to Mortgagors by mail. Mortgagee shall have the right to bid or purchase said vessel.

Article XV.

In the case of an event of default or maturity of the indebtedness or note, then the Mortgagee may retake with or without legal process possession of the vessel and other property herein mortgaged wherever the same may be found and/or sell and/or dispose of said mortgaged property at public or private sale after notice of said sale of at least five (5) days but not more than ten (10) days to the mortgagors by mail and the said sale may be held at such place or places and such time or times as the Mortgagee may by such notice have therein specified and said sale may be conducted without bringing said vessel or mortgaged property to the said place of sale and in such manner as the Mortgagee may deem to be to its best advantage. Mortgagee shall have the right to bid for and purchase said vessel or mortgaged property at any sale.

In the event of any default, the Mortgagee at is sole option may foreclose or enforce this Mortgage lien by suit in rem in admiralty and the Mortgagee shall be entitled to the appointment of a receiver or receivers of the said vessel and mortgaged property and of the tolls, earnings, revenues, rents, issues, profits and income thereof.

Article XVI.

Proceeds from any sale shall be applied as follows:

First. To pay charges of sale, including expenses of retaking.

Second. Attorney's fees and costs.

Third. Payment of unpaid balance of principal and interest on said note, and advances made by Mortgagee.

Fourth. Any surplus to Mortgagors. If insufficient funds are realized to satisfy the sums set out above, Mortgagors shall forthwith pay Mortgagee the amount of such deficiency.

Article XVII.

That in case the Mortgagee shall have proceeded to enforce any right under this indenture, by foreclosure, entry, or otherwise, and such proceedings shall have been discontinued or abandoned for any reason, or shall have been determined adversely to the Mortgagee, then the Mortgagor and the Mortgagee shall be restored to their former positions except that the cost of such proceedings and attorney's fees shall be charged to the account of the Mortgagors and bear interest.

Article XVIII.

That no delay or omission of the Mortgagee to exercise any right or power accruing upon any default shall impair any such right or power, or shall be construed to be a waiver of any such default or acquiescence therein; and every power and remedy given herein may be exercised from time to time and as often as may be deemed expedient. [29]

Article XIX.

Nothing contained in this mortgage shall be construed as a waiver of the preferred status of this mortgage by the Mortgagee.

Article XX.

In addition to the payment of the promissory note herein set forth, this mortgage shall secure the payment of all other sums with interest thereon which may hereafter be borrowed or received by the Mortgagor from Mortgagee or which may be paid by the Mortgagee for the account of Mortgagors.

Article XXI.

That in case the Mortgagee shall have proceeded to enforce any right under this indenture by foreclosure, possession, entry, or otherwise, and such proceedings shall have been discountinued or abandoned for any reason or shall have been determined adversely to the Mortgagee, then and in every such case the Mortgagors and the Mortgagee shall be restored to their former positions and rights hereunder with respect to the property subject or to

become subject to this Mortgage and all rights, remedies and powers of the Mortgagee shall continue as if no such proceedings had been taken except that the cost of such proceedings and Attorney's fees shall be charged to the account of the Mortgagors and bear interest as herein provided. That no delay or omission of the Mortgagee to exercise any right or power accruing upon any default shall impair any such right or power or shall be construed to be a waiver of any such default or acquiescence therein; and every power and remedy given by this Mortgage to the Mortgagee shall be concurrent and cumulative and may be exercised from time to time and as often as may be deemed expedient by the Mortgagee.

The remedies in favor of Mortgagee provided for herein shall not be construed to preclude Mortgagee in the event of default hereunder from enforcing any other appropriate remedies against Mortgagors or the vessel and mortgaged property, or from proceeding by suit or suits of law, admiralty or in equity as Mortgagee may consider advisable to enforce the payment or performance of any obligation secured hereby.

Article XXII.

This Mortgage may be simultaneously executed in any number of counterparts and all such counterparts executed and delivered each as an original shall constitute but one and the same instrument.

Article XXIII.

That in the event that this Mortgage or said

note or any provisions thereof be held invalid, in whole or in part under any present or future law of the United States or any decisions of any authoritative Court thereof, the Mortgagor shall execute such other or further instruments as in the opinion of Counsel for the Mortgagee will carry out the true intent and spirit of this Mortgage. From time to time the Mortgagors shall execute such further assurances as in the opinion of Counsel for the Mortgagee may be required more effectually to subject the property herein mortgaged or intended to be mortgaged to the payment of said principal sum and note. Invalidity of any provision hereof shall not impair or defeat the provisions hereof which are valid.

Article XXIV.

All notices to Mortgagor may be made by mail addressed to John Kremenic (G.P.S. Notary), 1108 West 24th Street, San Pedro, California.

All the covenants, stipulations, and agreements in this mortgage contained are and shall bind and inure to the benefit of the Mortgagors, their heirs, administrators, and assigns, and Mortgagee, its assigns.

In Witness Whereof, the Mortgagors have executed this mortgage the day and year first above written.

/s/ PETER RADIC,

/s/ JOHN KREMENIC.

(Acknowledgment for Corporation)
[Struck Out]

(Acknowledgment for Individual)

State of California,
County of Los Angeles—ss.

On this 9th day of May, 1950, before me, the undersigned a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Peter Radic and John Kremenic known to me to be the persons whose names are subscribed to the within mortgage, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

GORDON P.
SHALLENBERGER,
Notary Public in and for the County of Los Angeles,
State of California.

Affidavit of Mortgagor

State of California,
County of Los Angeles—ss.

Peter Radic and John Kremenic being duly sworn, depose and say: That they are the Owners and Mortgagors of the Vessel "Flying Cloud" official number 255,923, and that the attached mortgage is made in good faith and without any design to hinder, delay, or defraud any existing or future

creditor of the Mortgagor or any lienor of the above-mentioned vessel.

/s/ PETER RADIC,

/s/ JOHN KREMENIC.

Subscribed and sworn to before me this 9th day of May, 1950.

GORDON P.
SHALLENBERGER,
Notary Public in and for the County of Los Angeles, States of California. [31]

United States of America,
Southern District of California,
Central Division—ss.

Arch E. Ekdale being by me first duly sworn, deposes and says: that he is one of the attorneys for the Interveners in the above-entitled action; that he has read the foregoing Libel in Intervention to Foreclose Preferred Mortgage, and Libel in Intervention for Supplies and Materials and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

That the Interveners are unable to make the verification because authorized officers of said corporations are presently absent from said County of Los Angeles, and for that reason affiant makes this verification on behalf of said Interveners.

/s/ ARCH E. EKDALE.

Subscribed and sworn to before me this 28th day of September, 1950.

[Seal] /s/ GORDON P. SHALLENBERGER,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed September 29, 1950. [32]

[Title of District Court and Cause.]

ANSWER OF INTERVENERS, CROFTON DIESEL ENGINE COMPANY, INC., AND AL LARSON BOAT SHOP TO LIBEL—FORECLOSURE OF PREFERRED SHIP'S MORTGAGE, WITH ATTACHED INTERROGATORIES

To the Honorable, the Judges of the United States District Court for the Southern District of California, Central Division:

The Answer of Crofton Diesel Engine Company, Inc., a [33] California Corporation, and Al Larson Boat Shop, a California Corporation, Interveners, to the Libel of Puget Sound National Bank of Tacoma, a national banking corporation, against American Oil Screw "Flying Cloud," her engines, tackle, apparatus, boats, furniture and equipment, and Peter Radic and John Kremenic, in a cause of action, for foreclosure of preferred ship's mortgage, civil and maritime, admit, deny and allege as follows:

I.

Answering Articles III, IV, V, VI, VII, VIII,

IX, X, XI, XII and XIII of Libelant's First Cause of Action, these answering Interveners have no information or belief on the matters contained therein sufficient to enable them to answer the allegations of said Articles, and placing their denial on the ground of lack of information and belief deny generally, specifically and positively each and every allegation contained therein and the whole thereof.

Interveners, Crofton Diesel Engine Company, Inc., a California Corporation, and Al Larson Boat Shop, a California Corporation, In Answer to Libelant's Second Cause of Action, Admit, Deny and Allege as Follows:

I.

Answering Articles II, III, IV, V, VI, VII, VIII, IX, X, XI and XII of Libelant's Second Cause of Action, these answering Interveners have no information or belief on the matters contained therein sufficient to enable them to answer the allegations of said Articles, and placing their denial on the ground of lack of information and belief deny generally, specifically and positively each and every allegation contained therein and the whole thereof.

Interveners, Crofton Diesel Engine Company, Inc., a [34] California Corporation, and Al Larson Boat Shop, a California Corporation, for a Further First, Separate and Affirmative Defense to Libelant's Action, Allege as Follows:

I.

That this Honorable Court is without jurisdiction

in the premises in that the documents referred to as preferred ship's mortgages are not such, in law or fact, and never had the status of preferred ship's mortgages.

Interveners, Crofton Diesel Engine Company, Inc., a California Corporation, and Al Larson Boat Shop, a California Corporation, for a Further Second, Separate and Affirmative Defense to Libelant's Action, Allege as Follows:

I.

That these answering Interveners are informed and believe, and therefore allege, that the documents referred to in the Libel as preferred ship's mortgages are not such, in fact, for failure to comply with the Ship Mortgage Act of 1920, as amended, and specifically Paragraph (a) (4) of Section 922 of Title 46, U.S.C.A., and in that behalf these answering Interveners allege that they are informed and believe and therefore allege that both of said alleged preferred ship's mortgages specifically provide that the Mortgagor may incur liens for current operation and repairs "to be kept currently paid within thirty days of date incurred"; that said documents fail in other particulars to abide by the terms of the aforementioned Ship Mortgage Act of 1920, as amended, the particulars of which these answering Intervenors are not now advised, and that when so advised, these answering Intervenors will pray leave to amend this their said answer accordingly.

Wherefore, Interveners pray that the Libelant take nothing [35] by its cause of action alleged and that claims of Interveners, Crofton Diesel Engine Company, Inc., a California Corporation, and Al Larson Boat Shop, a California Corporation, be held prior to those of Libelant, and that Interveners be allowed to go hence with their costs of suit incurred, and for such other and further relief as to the Court may seem just and meet in the premises.

EKDALE &
SHALLENBERGER,

By /s/ ARCH E. EKDALE,
Proctors for Interveners, Crofton Diesel Engine Company, Inc., and Al Larson Boat Shop. [36]

INTERROGATORIES ADDRESSED TO LIBELANT, PUGET SOUND NATIONAL BANK OF TACOMA, TO BE ANSWERED BY IT IN WRITING UNDER OATH

Interrogatory 1.

What was the consideration for the notes and mortgages, and to whom and when were they paid?

Interrogatory 2.

What, if any, part of the consideration or of the demand in the libel was paid for insurance premiums?

Interrogatory 3.

Is the form of the so-called preferred ship's mortgages sued upon Custom Form 1348, Treasury Department, 3.33, 3.38, C.R. 1943—April, 1943?

If so, was anything done to make it a preferred ship's mortgage in addition to typing the word "preferred" in front of the word "mortgage" at the top of said Form? Explain in detail.

Interrogatory 4.

Is it not a fact that the forms of the so-called mortgages authorize the vessel to run in debt for a reasonable sum for current operation and repairs "to be kept currently paid within thirty days of date incurred"?

Interrogatory 5.

If your answer to Interrogatory 4 is in the affirmative, state the purpose of allowing the vessel to run into debt.

Interrogatory 6.

Who will have possession of the preferred ship's mortgages and notes pending the time of trial? [37]

Interrogatory 7.

Is it a fact that the notes are guaranteed by others than parties to this suit?

If so, state to whom, in what amounts, and why the guarantees were made.

Interrogatory 8.

If guarantees exist on the notes, is other collateral pledged, and if so, of what does it consist?

Interrogatory 9.

Does there exist or was there pledged any col-

lateral or security other than the vessel "Flying Cloud" for the notes alleged to be secured by the first and second mortgages?

Interrogatory 10.

If your answer to Interrogatory 9 is in the affirmative, state what other collateral and security, when taken, and what its present status is.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed November 30, 1950. [38]

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES ADDRESSED TO LIBELANT, THE PUGET SOUND NATIONAL BANK OF TACOMA

County of Pierce,
State of Washington—ss.

C. D. Ogden, being first duly sworn, deposes and says:

That he is a Vice President of The Puget Sound National Bank, the plaintiff herein; that he is authorized to execute this affidavit for and on behalf of said bank; that his answers to the interrogatories proposed by the intervenors are as follows:

Answer 1.

The first preferred mortgage supports a note in the amount of Twenty-five Thousand and No/100 Dollars ($25,000.00) dated August 18, 1948, payable to The Puget Sound National Bank of Tacoma. The

funds amounting to $25,000.00 went through the hands of Peter Radic and John Kremenic to the Kazulin-Cole Shipbuilding Corporation as part of the purchase price of the vessel O/SS "Flying Cloud," covered by the relative mortgage.

The second preferred mortgage supports a note signed by Peter Radic and John Kremenic on August 18, 1948, payable to Kazulin-Cole Shipbuilding Corporation. This was given to that corporation as an additional part of the purchase price of the vessel O/S Flying Cloud. This note was then endorsed and the relative mortgage assigned to the Puget Sound National Bank of Tacoma by the Kazulin-Cole Shipbuilding Corporation, as collateral to a loan in like amount made by The Puget Sound National Bank of Tacoma, to Kazulin-Cole Shipbuilding Corporation, for which that corporation [41] received $10,000.00 to complete paying bills incurred in the construction of the vessel O/S "Flying Cloud."

Answer 2.

The Puget Sound National Bank of Tacoma has paid a premium of $1,601.38 to W. N. Gates, of 327 East First Street, Long Beach, California, for Port Risk Insurance on the vessel O/S "Flying Cloud." On the day the vessel was sold by the United States Marshal, these policies were delivered to Mr. Gates to be short-rated. There will be a return premium to be applied against this fund, but the amount is not yet known.

In addition, we are obligated to the Commercial Fishermen's Inter-Insurance Exchange in the amount of $679.66, representing that portion of the

premium on insurance then in force accrued after July 19, 1950, as a result of a guaranty given by this bank to that company to stop the cancellation of insurance while the vessel was still in use.

The insurance above referred to is Protection and Indemnity Insurance and Hull Insurance on the vessel O/S "Flying Cloud."

Answer 3.

The document containing the plaintiff's preferred ship's mortgage, referred to in the complaint herein, consists of Customs Form 1348, together with certain typewritten additions. The said document became a preferred ship's mortgage on the vessel O/S "Flying Cloud" when the following things were done:

(a) When it was executed by Radic and Kremenic upon the whole of the vessel O/S "Flying Cloud," a vessel of the United States, on August 18, 1948:

(b) Its endorsement on the vessel's documents, on [42] August 19, 1948;

(c) Its recordation with the Collector of Customs at Tacoma, Washington, in accordance with Sec. 921, U.S. Code, Title 46, together with a notation as to the time and date of endorsement, on August 19, 1948, at 4:20 o'clock, p.m., in Book P2, Instrument No. 41, of the records of said Collector of Customs.

(d) An affidavit of Radic and Kremenic, dated August 18, 1948, was filed with said record of said mortgage stating that the said

mortgage "is made in good faith and without any design to hinder, delay or defraud any existing or future creditor of the mortgagors or any lienor" of the said vessel;

(e) The mortgage did not stipulate that the mortgagee waived the preferred status thereof;

(f) The mortgagee was a citizen of the United States.

Answer 4.

No—the mortgages state a condition, the happening of which will accelerate the maturity of the debt and mortgage. The condition referred to is stated in the mortgage as follows:

> "if said first parties (mortgagors) shall suffer and permit said vessel to be run in debt to an amount exceeding in the aggregate the sum of a reasonable sum for strictly current operation and repairs to be kept currently paid within thirty days of date incurred . . . the party of the second part (mortgagee) is hereby authorized to take possession of said goods and chattels . . . either before or after the expiration of the time aforesaid, and sell and convey the same . . . to satisfy the debt . . . (etc.) [43]

Answer 5

The mortgagors, after execution of a preferred ship's mortgage, have the right to incur other debts and liens against the vessel, only such debts and liens are subordinate to the preferred mortgage. The above clause in the mortgage, quoted in answer to Interrogatory 4, is a limitation on such right.

Answer 6.

Herbert R. Lande.

Answer 7.

We hold a separate guaranty to the note secured by the first preferred mortgage signed by Kazulin-Cole Shipbuilding Corporation, Alva E. Cole, Mike Kazulin, Peter V. Vale, and A. M. Ursich, as individuals.

The note for which the second mortgage is assigned as collateral is endorsed by Alva E. Cole, Mike Kazulin, Peter V. Vale and A. M. Ursich, and is made by the Kazulin-Cole Shipbuilding Corporation.

Answer 8.

There is no other collateral pledged.

Answer 9.

There never has been any other collateral pledged.

Answer 10.

See answer to Interrogatory 9.

/s/ C. D. OGDEN.

Subscribed and sworn to before me this 15th day of December, 1950.

[Seal]: /s/ WINIFRED R. BRECHT,
Notary Public in and for Pierce County and the State of Washington, residing at Tacoma.

Affidavit of service by mail attached.

Receipt of copy acknowledged.

[Endorsed]: Filed December 19, 1950. [44]

[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED TO INTERVENER, CROFTON DIESEL ENGINE CO., INC., A CORPORATION

Pursuant to Rule 33 of Rules of Civil Procedure, the intervenor Crofton Diesel Engine Co., Inc., a corporation, by its officers and agents, is hereby requested to answer under oath the following interrogatories within fifteen (15) days from the date of service:

1. State whether the Crofton Diesel Engine Co., Inc., had a claim or debt against the respondent D/V "Flying Cloud."

2. If the answer to the first question is in the affirmative, state the amount of the claim, the date or dates of the transactions giving rise to it, and the details of the charges, with a statement as to the nature, character and particulars of each charge.

3. State whether or not any goods, merchandise, labor, services or machinery, furnished by Crofton Diesel Engine Co., Inc., [53] to the D/V "Flying Cloud," are claimed to have been for current operation and/or repairs to the respondent vessel; and if so, state with particularity the details and items of each, with dates and sums charged for each.

4. If the answer to the first question is in the affirmative, state whether a mortgage was given to secure the claim or debt, and if so, attach a complete copy of same to the answer.

5. State whether or not the Crofton Diesel En-

gine Co., Inc., through its officers and agents, knew of the mortgage of the libelant, dated August 18, 1948, in the principal sum of $25,000.00, and the mortgage of Kazulin-Cole Shipbuilding Corporation, dated August 18, 1948, in the principal sum of $10,000.00, prior to and at the time the said claim or debt of Crofton Diesel Engine Co., Inc., against the D/V "Flying Cloud" was created.

6. If the answer to Interrogatory 5 is in the negative, state whether or not the Crofton Diesel Engine Co., Inc., by and through its officers and agents, inspected the official document of the "Flying Cloud," prior to or at the time of the creation of the claim or debt of the Crofton Diesel Engine Co., Inc., against the "Flying Cloud."

7. If the answer to Interrogatory 5 is in the negative, state whether or not, prior to or at the time of creation of the claim or debt of Crofton Diesel Engine Co., Inc., against the "Flying Cloud," the Crofton Diesel Engine Co., Inc., by and through its officers and agents, searched or had searched the official records of mortgages of the Collector of Customs at Tacoma, State of Washington, to ascertain what mortgages were recorded against and upon said vessel.

Dated: January 3, 1951.

Respectfully submitted,

/s/ HERBERT R. LANDE,
Proctor for Libelant.

Affidavit of service by mail attached.

[Endorsed]: Filed January 4, 1951. [54]

[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED TO INTERVENER, AL LARSON BOAT SHOP, A CORPORATION

Pursuant to Rule 33 of Rules of Civil Procedure, the intervener Al Larson Boat Shop, a corporation, by its officers and agents, is hereby requested to answer under oath the following interrogatories within fifteen (15) days from the date of service hereof:

1. State whether or not Al Larson Boat Shop, a corporation, had a claim or debt against the respondent vessel "Flying Cloud."

2. If the answer to the first question is in the affirmative, state the amount of the claim, the date or dates of the transactions giving rise to it, and the details of the charges, with a statement as to the nature, character and particulars of each charge.

3. State whether or not any goods, merchandise, labor, services or machinery, furnished by Al Larson Boat Shop, a corporation, [56] to the D/V "Flying Cloud," are claimed to have been for current operation and/or repairs, to the respondent vessel; and if so, state with particularity the details and items of each, with dates and sums charged for each.

4. State whether or not the Al Larson Boat Shop, a corporation, through its officers and agents, knew of the mortgage of the libelant, dated August 18, 1948, in the principal sum of $25,000.00, and the

mortgage of Kazulin-Cole Shipbuilding Corporation, dated August 18, 1948, in the principal sum of $10,000.00, prior to and at the time the said claim or debt of Al Larson Boat Shop, a corporation, against the D/V "Flying Cloud" was created.

5. If the answer to Interrogatory 4 is in the negative, state whether or not the Al Larson Boat Shop, a corporation, by and through its officers and agents, inspected the official document of the "Flying Cloud," prior to or at the time of the creation of the claim or debt of the Al Larson Boat Shop, a corporation, against the "Flying Cloud."

6. If the answer to Interrogatory 4 is in the negative, state whether or not, prior to or at the time of creation of the claim or debt of Al Larson Boat Shop, a corporation, against the "Flying Cloud," the Al Larson Boat Shop, a corporation, by and through its officers and agents, searched or had searched the official records of mortgages of the Collector of Customs at Tacoma, State of Washington, to ascertain what mortgages were recorded against and upon said vessel.

Dated: January 3, 1951.

Respectfully submitted,

/s/ HERBERT R. LANDE,
Proctor for Libelant.

Affidavit of service by mail attached.

[Endorsed]: Filed January 4, 1951. [57]

[Title of District Court and Cause.]

ANSWERS OF INTERVENOR, CROFTON DIESEL ENGINE COMPANY, INC., TO INTERROGATORIES PROPOUNDED TO SAID INTERVENER BY LIBELANT

Interrogatory No. 1.

Yes.

Interrogatory No. 2.

Attached hereto is a copy of the invoices showing the amount, the dates, the details [68] of the charges, and the nature, character and particulars of each charge; said invoices are for the use of counsel for Libelant, to be returned to counsel for Crofton Diesel Engine Company, Inc., prior to the time of trial.

Interrogatory No. 3.

Yes. See answer to Interrogatory No. 2.

Interrogatory No. 4.

Yes. A Certified Copy of the Mortgage is attached hereto for the use of Counsel for Libelant, to be returned to Counsel for Crofton Diesel Engine Company, Inc., prior to the time of trial.

Interrogatory No. 5.

Yes, to this extent—Peter Radic delivered to counsel for Crofton Diesel Engine Company, Inc., and Al Larson Boat Shop, a letter from B. A. McKenzie & Co., Inc., dated March 28, 1950, enclosing a copy of the Certificate of Ownership of the vessel, showing of record the two mortgages alleged to be pre-

ferred, but Crofton Diesel Engine Company, Inc., had no notice prior to on or about May 1, 1950, and had no notice of the contents of the preferred mortgages until long after the filing of the libel, and then counsel for the Intervener, Crofton Diesel Engine Company, Inc., demanded of Charles Kent, the right to see the two mortgages and the assignment, and at that time was shown the same.

Interrogatory No. 6.

See answer to Interrogatory No. 5. [69]

Interrogatory No. 7.

See answer to Interrogatory No. 5.

Dated: 10 January, 1951.

CROFTON DIESEL ENGINE COMPANY, INC.,
a Corporation,

By /s/ WILLIAM B. CROFTON,
President.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed January 12, 1951. [70]

[Title of District Court and Cause.]

ANSWERS TO INTERVENER, AL LARSON BOAT SHOP, TO INTERROGATORIES PROPOUNDED TO SAID INTERVENER BY LIBELANT

Interrogatory No. 1.

Yes.

Interrogatory No. 2.

Previously furnished. [72]

Interrogatory No. 3.

Yes—see answer to Interrogatory No. 2.

Interrogatory No. 4.

Yes, to this extent—Peter Radic delivered to counsel for Al Larson Boat Shop, and Crofton Diesel Engine Company, Inc., a letter from B. A. McKenzie & Co., Inc., dated March 28, 1950, enclosing a copy of the Certificate of Ownership of the vessel, showing of record the two mortgages alleged to be preferred, but Al Larson Boat Shop had no notice prior to on or about May 1, 1950, and had no notice of the contents of the preferred mortgages until long after the filing of the libel, and then counsel for Intervenor, Al Larson Boat Shop, demanded of Charles Kent, the right to see the two mortgages and the assignment, and at that time was shown the same.

Interrogatory No. 5.

Interrogatory No. 4 answered in the affirmative.

Interrogatory No. 6.

Interrogatory No. 4 answered in the affirmative.

Dated: 10 January, 1951.

AL LARSON BOAT SHOP,
A California Corporation,

By /s/ ADOLPH LARSON,
Secretary-Treasurer.

Duly Verified.

Affidavit of service by mail attached.

[Endorsed]: Filed January 12, 1951. [73]

[Title of District Court and Cause.]

OFFER TO STIPULATE

Interveners, Crofton Diesel Engine Company, Inc., and Al Larson Boat Shop, offer to stipulate to the following:

1. The corporate entity of the corporate parties is [79] conceded.

2. The respondents are residents of San Pedro, California.

3. The mortgages of the Libelant, and the Intervener, Crofton Diesel Engine Company, Inc., were filed and recorded at the place and on the dates indicated. All mortgages and notes are in default.

4. The Libelant's notes and mortgages were given as evidence and security for loans to the Respondents to purchase the ship.

5. The note and mortgage to Crofton Diesel Engine Company, Inc., was given as evidence and security for goods, wares and services furnished the vessel on order of the Respondent owners.

6. Interveners, Al Larson Boat Shop and Ets-Hokin & Galvan, furnished goods, wares and services to the ship on order of the Respondents.

7. That the salvage claim of Intervener, John Marumoto, is uncontested save as to amount; that the salvage awarded is a paramount and senior lien to the claims of all others; that the vessel was insured against salvage; that Libelant is an assured and loss-payee; that Interveners are entitled to the protection of said insurance; that said insurance is in the form of indemnity; that there be set aside in the registry of the Court, Three Thousand Five Hundred and No/100 Dollars ($3,500.00) for the use and benefit of said Marumoto, conditioned upon his first exhausting his rights to collect his salvage award from said Underwriters.

8. If the Libelant's mortgages are in fact and law Preferred Ship's Mortgages, then the liens of Al Larson Boat Shop and Ets-Hokin & Galvan, and Crofton's Preferred Ship's Mortgage claim are all subject to the effect of said mortgages. If the Libelant's mortgages are not in fact and law Preferred Ship's Mortgages, then [80] Libelant's claim is junior, and it is entitled to recover, if at all, only after all other maritime claims have been paid in full.

9. As between Crofton Diesel Engine Company, Inc., on the one hand, and Al Larson Boat Shop and Ets-Hokin & Galvan on the other, parts of the claims are junior to Crofton's Preferred Ship's Mortgage, and parts are senior, as follows:

Paramount to Crofton's Preferred Ship's Mortgage

(a) Al Larson Boat Shop.....$1,164.08

(b) Ets-Hokin & Galvan (to be determined).

Junior to Crofton's Preferred Ship's Mortgage

(a) Al Larson Boat Shop.....$2,209.83

(b) Ets-Hokin & Galvan (to be determined).

10. Among the issues to be tried are:

(a) Do the Libelant's mortgages constitute in law and fact Preferred Ship's Mortgages?

(b) If said mortgages are preferred in law and fact, then there shall be determined what portions of Interveners' claims, if any, are preferred to the Libelant's mortgages.

(c) If Libelant's mortgages are held to be preferred in law and fact, then the amounts due the parties and the order of preferences.

(d) The preference of the Interveners, Ets-Hokin & Galvan, [81] if any it has.

11. The amounts due the Libelant, and Interveners, Crofton Diesel Engine Company, Inc., and Al Larson Boat Shop (without conceding the legal effect of said mortgages or claims as above provided) are as follows:

(1) Libelant's mortgage and note dated October 31, 1949

Principal Unpaid	$20,267.40
Interest calculated to January 1, 1951	1,188.88
	$21,456.28
Attorney's Fees at 10%	2,145.62
	$23,601.90
Costs	$.....

(2) Libelant's mortgage and note dated November 30, 1950

Principal Unpaid	$10,000.00
Interest calculated to January 1, 1951	650.00
	$10,650.00
Attorney's Fees at 10%	1,065.00
	$11,715.00
Costs	$.....

Recap of (1) and (2)	1st Mortgage	$23,601.90
	2nd Mortage	11,715.00
		$35,316.90
	Costs	$.....

(3) Claim of Intervener, Al Larson Boat Shop

Amount due Larson	$ 1,164.08

(including interest to January 1, 1951)

Costs $.....

(4) Intervener Crofton's Third Preferred Ship's Mortgage

Principal Unpaid.....	$ 6,500.00
Interest calculated to January 1, 1951.....	255.65
	$ 6,755.65
Attorneys' Fees at 10%.....	675.56
	$ 7,431.21

Costs $.....

(5) Claim of Intervener, Al Larson Boat Shop

Amount due Larson.....$ 2,209.83

(including interest to January 1, 1951)

Costs $.....

Dated January 16, 1951.

EKDALE &
SHALLENBERGER,

By /s/ ARCH E. EKDALE,

Proctors for Interveners, Crofton Diesel Engine Company, Inc., and Al Larson Boat Shop.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 20, 1951. [83]

[Title of District Court and Cause.]

LIBELANT'S ACCEPTANCE (PARTIAL) OF OFFER TO STIPULATE, MADE BY INTERVENERS AL LARSON BOAT SHOP AND CROFTON DIESEL ENGINE COMPANY, INC.

Libelant joins in the stipulation offered by Interveners Al Larson Boat Shop and Crofton Diesel Engine Company, Inc., in the following [85] respects:

1. Libelant stipulates to facts stated in Paragraphs (1), (2), (3), (4), (5), (6), and (7) of offer.

2. Libelant refuses to join in the purported stipulation set forth in Paragraph (8) of the offer in that said Paragraph (8) does not contain a stipulation as to facts, but as to the law of the case, which is a matter for the Court.

3. Libelant stipulates to facts stated in Paragraph (9) of offer.

4. Libelant will file a "Pre-Trial Statement of Issues" to cover the matters in Paragraph (10) of offer.

5. Libelant stipulates to facts set forth in Paragraph (11) of offer.

Dated January 22, 1951.

HERBERT R. LANDE &
CHARLES H. KENT,
By /s/ HERBERT R. LANDE,
Proctors for Libelant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 23, 1951. [86]

[Title of District Court and Cause.]

ORDER FOR FINDINGS AND DECREE

This cause having been tried and submitted for decision as to all parties except intervener John Marumoto, [117] findings and decree are now ordered as follows:

(a) in favor of libelant for the foreclosure of libelant's first preferred ship's mortgage [Exhibit 7] and libelant's second preferred ship's mortgage [Exhibit 8] as prayed for, plus an additional sum of $1,462.39 advanced by libelant to cover insurance premiums on the mortgaged vessel and plus an allowance of $3,500 for attorneys' fees and libelant's costs;

(b) in favor of intervener Crofton Diesel Engine Company, Inc., for the foreclosure of said intervener's third preferred mortgage on the vessel [Intervener Crofton's Exhibit "A"] as prayed for, plus an allowance of $675 for attorneys' fees and an award of $229.27 for supplies and materials furnished by said intervener over and above the amount of the mortgage, and said intervener's costs;

(c) in favor of intervener Al Larson Boat Works for the sum of $3,197.76, and said intervener's costs;

(d) in favor of intervener Ets-Hokin & Galvan for $867.92, and said intervener's costs;

(e) with priorities fixed as follows:

First: all claims secured by libelant's first and second preferred mortgages, including the sum of $1,462.39 advanced to cover insurance premiums,

taxable costs and the sum of $3,500 for attorneys' fees;

Second: the claim of Al Larson Boat Works to the extent of $1,013.06;

Third: the claim of Ets-Hokin & Galvan to the extent of $35.97;

Fourth: the claim of Crofton Diesel [118] Engine Company, Inc., to the extent of $229.27;

Fifth: the claim of Ets-Hokin & Galvan to the extent of $808.80;

Sixth: the claim of Al Larson Boat Works to the extent of $1,664.89;

Seventh: all claims secured by the third preferred mortgage of Crofton Diesel Engine Company, Inc., including taxable costs and the sum of $675 for attorneys' fees;

Eighth: the claim of Al Larson Boat Works to the extent of $55.14;

Ninth: the claim of Al Larson Boat Works to the extent of $59.55, and the balance of the claim of Ets-Hokin & Galvan in the sum of $23.15 plus taxable costs; and

Tenth: the balance of the claim of Al Larson Boat Works in the sum of $5.12 plus taxable costs.

It Is Further Ordered that proctors for libelant prepare findings of fact, conclusions of law and decree accordingly and settle under local rule 7 within five days.

It Is Further Ordered that the Clerk this day

serve this order by United States mail on the proctors for the parties appearing in this cause.

July 19, 1951.

/s/ WM. C. MATHES,
United States District Judge.

[Endorsed]: Filed July 19, 1951. [119]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter came on regularly for trial as to all parties except intervener John Marumoto, on July 9, 1951, in the above-entitled Court, Honorable William C. Mathes, United States District Judge, presiding; Herbert R. Lande and Charles H. Kent [120] appearing as proctors for libelant; Ekdale & Shallenberger by Arch E. Ekdale as proctors for interveners Crofton Diesel Engine Company, Inc., and Al Larson Boat Works, a corporation; and Hansen & Sweeney by John R. Y. Lindley as proctors for intervener Ets-Hokin & Galvan, a corporation; and it appearing that the respondent vessel has been seized by the Marshal of this Court under a monition issued herein and sold under previous order of Court, the sale confirmed and the proceeds of sale deposited in Court; and it further appearing that a citation and copy of the libel of the interveners Crofton Diesel Engine Company, Inc., and Al Larson Boat Works has

been served personally on the respondents Peter Radic and John Kremenic, and that they have failed to answer same or appear herein, and that default has been taken and entered against them by said interveners, and the default of all persons not appearing having been entered; and a stipulation having been filed by all parties appearing in this action that the sum of $3,500.00 of the funds on deposit in the registry of the above Court be withheld and remain undisbursed until the issues raised by the libel in intervention of John Marumoto and the answer of Peter Radic and John Kremenic are settled or otherwise disposed of; and evidence oral and documentary having been taken and introduced by all parties so appearing, and the cause having been submitted for decision; the Court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. That it is true that on August 18, 1948, and now, the libelant was and is a national banking corporation and a citizen of the United States.

2. That it is true that on August 18, 1948, the respondent oil screw Flying Cloud was an American fishing vessel duly enrolled and documented under the laws of the United States at Tacoma, State of Washington, and that the home port of said [121] vessel was said City of Tacoma; that said vessel was owned by Peter Radic, owning 50%, and John Kremenic, owning 50%.

3. That it is true that on August 18, 1948, said Peter Radic and John Kremenic executed their promissory note in the sum of $25,000.00 to the libelant, payable on October 31, 1949, with interest at 5% per annum; that said note further provided that in the event suit were instituted on the note, that the makers thereof agreed to pay a reasonable attorneys' fee to the holder of the note; that the libelant is now the holder of said note.

4. That it is true that on August 18, 1948, the said Peter Radic and John Kremenic executed a mortgage upon the whole of said vessel Flying Cloud in favor of libelant, to secure the payment of said note for $25,000.00; that said mortgage provided that it was also given to secure the terms of the said promissory note, and provided that the said Peter Radic and John Kremenic should keep the respondent vessel insured against marine risks for an amount at least equal to the unpaid indebtedness to libelant, and that if Peter Radic and John Kremenic failed to do so, libelant could procure such insurance, the cost of which was to be repaid libelant by Peter Radic and John Kremenic, upon demand, and that the said mortgage was security for the repayment thereof; that said Peter Radic and John Kremenic failed to keep the said vessel insured, and libelant expended $1,462.39 for such insurance premiums, no part of which has been repaid.

5. That it is true that the sum of $4,732.60 has been paid upon the principal of said note, and that

the balance due, owing and unpaid is $20,267.40; that interest on said note has been paid to October 31, 1949; that interest from November 1, 1949, to June 30, 1951, amounts to $1,688.95, and that said interest is due, owing and unpaid to the [122] libelant.

6. That it is true that said mortgage on the respondent vessel was recorded at Tacoma, State of Washington, on August 18, 1948, by the Collector of Customs at Tacoma; that said mortgage was endorsed on the outstanding document of said vessel on August 24, 1948, by the Collector of Customs at Los Angeles, State of California, by request of the Collector of Customs at Tacoma, Washington, and that an affidavit was made by Peter Radic and John Kremenic and filed with the record at Tacoma, that the said mortgage was made in good faith.

7. That it is true that the aforesaid mortgage did not stipulate that the mortgagee waived the preferred status thereof.

8. That it is true that on August 18, 1948, said Peter Radic and John Kremenic executed their promissory note in the sum of $10,000.00 to the Kazulin Cole Shipbuilding Corporation, payable on November 30, 1949, with interest at 6% per annum; that said note further provided that in the event suit were instituted on the note, that the makers thereof agreed to pay a reasonable attorney's fees to the holder of the note; that the libelant is now the holder of said note.

9. That it is true that on August 18, 1948, the said Peter Radic and John Kremenic executed a mortgage upon the whole of said vessel Flying Cloud in favor of the Kazulin Cole Shipbuilding Corporation, to secure the payment of said note for $10,000.00; that said mortgage provided that it was also given to secure the terms of said promissory note.

10. That it is true that no sum has been paid upon the principal of said note, and that the balance due, owing and unpaid is $10,000.00; that interest on said note has been paid to November 30, 1949; that interest from December 1, 1949, to June 30, 1951, amounts to $950.00; and that said interest is due, owing and unpaid to the libelant. [123]

11. That it is true that said mortgage on the respondent vessel was recorded at Tacoma, State of Washington, on August 19, 1948, by the Collector of Customs at Tacoma; that said mortgage was endorsed on the outstanding document of said vessel on August 24, 1948, by the Collector of Customs at Los Angeles by request of the Collector of Customs at Tacoma, Washington; and that an affidavit was made by Peter Radic and John Kremenic and filed with the record of the mortgage at Tacoma; that the said mortgage was made in good faith.

12. That it is true that the aforesaid mortgage did not stipulate that the mortgage waived the preferred status thereof.

13. That it is true that on October 19, 1949, the

said Kazulin Cole Shipbuilding Corporation assigned said preferred mortgage to the libelant herein, and that said assignment was recorded at the Custom House, Tacoma, Washington, on March 23, 1950, and that said assignment was endorsed on the document of the respondent vessel on March 24, 1950, by the Collector of Customs at Los Angeles, by request of the Collector of Customs at Tacoma, Washington.

14. That it is true that on May 9, 1950, and now, intervener Crofton Diesel Engine Company, Inc., a corporation, was and is a citizen of the United States.

15. That it is true that on May 9, 1950, said Peter Radic and John Kremenic executed their promissory note in the sum of $6,500.00 to the said intervener Crofton Diesel Engine Company, Inc., payable on or before May 1, 1952, with interest at 6% per annum; that said note further provided that in the event suit were instituted on said note, that the makers thereof agreed to pay a reasonable attorney's fee to the holder of the note; that the said intervener Crofton Diesel Engine Company, Inc., is now the holder of said note. [124]

16. That it is true that on May 9, 1950, the said Peter Radic and John Kremenic executed a third mortgage upon the whole of the respondent vessel, in favor of intervener Crofton Diesel Engine Company, Inc., to secure the payment of said note of $6,500.00; that said mortgage also provided that it was security for further advances of credit from the

intervener Crofton Diesel Engine Company, Inc., to the said makers of said note; that said mortgage provided that if the respondent vessel be seized by the Marshal and not be released by the said mortgagors within ten (10) days, the debt would become immediately due and the said mortgage could be foreclosed; that the respondent vessel was seized by the United States Marshal and the said mortgagors failed to secure the release of said vessel within ten (10) days thereof.

17. That it is true that no sums have been paid upon the principal or interest of said note of intervener Crofton Diesel Ergine Company, Inc.; that said intervener furnished supplies and materials to the mortgagors Peter Radic and John Kremenic in the sum of $229.27, no part of which has been paid; that there is due, owing and unpaid intervener Crofton Diesel Engine Company, Inc., the sum of $6,729.27, plus interest to June 30, 1951, in the sum of $512.50.

18. That it is true that said third mortgage to intervener Crofton Diesel Engine Company, Inc., was recorded in the Office of the Collector of Customs at Tacoma, Washington, on May 29, 1950, and was endorsed on the outstanding document of the respondent vessel; that an affidavit of good faith was made by Peter Radic and John Kremenic and filed with the said record of said mortgage.

19. That it is true that the said third mortgage to intervener Crofton Diesel Engine Company, Inc.,

did not stipulate that the mortgage waived the preferred status thereof. [125]

20. That it is true that the reasonable value of the services of the proctors for the libelant herein is the sum of $3,500.00.

21. That it is true that the reasonable value of the services of the proctors for the intervener Crofton Diesel Engine Company, Inc., is the sum of $675.00.

22. That it is true that intervener Al Larson Boat Works furnished work and materials to the respondent vessel for current operations and repairs in the sum of $3,497.76, of which $300.00 was paid on March 1, 1950, and that $3,197.76 is now due, owing and unpaid said intervener.

23. That it is true that intervener Ets-Hokin & Galvan furnished labor and material to the respondent vessel for current operations and repairs in the sum of $867.92, no part of which has been paid and which is now due, owing and unpaid said intervener.

24. That it is true that the sequence of supplies, materials and labor furnished to the said respondent vessel by the interveners was as follows:

Furnished After Date of Libelant's Mortgages:

(a)	Al Larson Boat Works.....	$1,013.06
(b)	Ets-Hokin & Galvan.....	35.97
(c)	Crofton Diesel Engine Company Inc.....	229.27
(d)	Ets-Hokin & Galvan.....	808.80

(e) Al Larson Boat Works..... 1,664.89

Furnished After Mortgage of Intervener, Crofton Diesel Engine Company, Inc.:

(f) Al Larson Boat Works.....$ 455.14

(g) Al Larson Boat Works $59.55 and Ets-Hokin & Galvan $23.15, furnished contemporaneously.

(h) Al Larson Boat Works..... 5.12

Conclusions of Law

25. That the mortgage of the libelant on the respondent vessel given to secure the note for $25,000.00, was a valid first preferred ship's mortgage on said respondent vessel, and is a valid first lien on the proceeds of sale of said respondent vessel held in the registry of this Court; that the sum of $20,267.40 is due upon the principal of said note, plus interest to June 30, 1951, in the sum of $1,688.95, and further interest at the rate of 5% per annum from said date to the date of final decree herein, plus the sum of $1,462.39, all of which libelant is entitled to recover first in order from the money so held in the registry of this Court.

26. That the mortgage on the respondent vessel given to the Kazulin Cole Shipbuilding Corporation to secure the note for $10,000.00, and assigned to libelant, was a valid second preferred ship's mortgage, and is a valid second lien on the proceeds of sale of said respondent vessel held in the registry of this Court; that the sum of $10,000.00 is due upon the principal of said note, plus interest to June 30, 1951, in the sum of $950.00, and further

interest at the rate of 6% per annum from said date to the date of final decree herein, all of which the libelant is entitled to recover second in order from the money so held in the registry of this Court.

27. That the libelant is entitled to recover the sum of $3,500.00 from the proceeds of sale of said respondent vessel held in the registry of this Court, under the provisions of the aforesaid preferred mortgages, and that said recovery is entitled to be third in order.

28. That the libelant is entitled to recover taxable costs in the sum of $....., and such recovery shall be fourth in order from the proceeds of sale of said respondent vessel held in the registry of this Court. [127]

29. That intervener Al Larson Boat Works acquired a maritime lien on respondent vessel and is entitled to recover the sum of $1,013.06 from the proceeds of sale in the registry of this Court, and such recovery shall be fifth in order.

30. That intervener Ets-Hokin & Galvan acquired a maritime lien on respondent vessel and is entitled to recover the sum of $35.97 from the proceeds of sale in the registry of this Court, and such recovery shall be sixth in order.

31. That intervener Crofton Diesel Engine Company, Inc., acquired a maritime lien on respondent vessel and is entitled to recover the sum of $229.27 from the proceeds of sale in the registry of this

Court, and such recovery shall be seventh in order.

32. That intervener Ets-Hokin & Galvan acquired a maritime lien on respondent vessel and is entitled to recover the sum of $808.80 from the proceeds of sale in the registry of this Court, and such recovery shall be eighth in order.

33. That intervener Al Larson Boat Works acquired a maritime lien on respondent vessel and is entitled to recover the sum of $1,664.89 from the proceeds of sale in the registry of this Court, and such recovery shall be ninth in order.

34. That the mortgage on the respondent vessel, given to Crofton Diesel Engine Company, Inc., to secure the note for $6,500.00 was a valid third preferred ship's mortgage on respondent vessel and is a valid tenth lien on the proceeds of sale of the respondent vessel held in the registry of this Court; that the sum of $6,500.00 is due on the principal of said note plus interest in the sum of $512.50 to June 30, 1951, and further interest at the rate of 6% per annum from said date to the date of final decree herein; all of which said intervener Crofton Diesel Engine Company, Inc., is entitled to recover tenth in order from the said proceeds of sale in the registry of this Court. [128]

35. That intervener Crofton Diesel Engine Company, Inc., is entitled to recover $675.00 from the proceeds of sale of the respondent vessel held in the registry of this Court, under the provisions of said third preferred ship's mortgage, and that such recovery shall be eleventh in order.

36. That intervener Crofton Diesel Engine Company, Inc., is entitled to recover taxable costs in the sum of $..... from the proceeds of sale of the respondent vessel held in the registry of this Court, and such recovery shall be twelfth in order.

37. That intervener Al Larson Boat Works acquired a maritime lien on respondent vessel and is entitled to recover the sum of $455.14 from the proceeds of sale of said vessel held in the registry of this Court, and such recovery shall be thirteenth in order.

38. That intervener Al Larson Boat Works acquired a maritime lien on respondent vessel and is entitled to recover the sum of $59.55 plus taxable costs in the sum of $.....; Ets-Hokin & Galvan acquired a maritime lien on respondent vessel and is entitled to recover the sum of $23.15 plus taxable costs in the sum of $.....; all pro rata from the proceeds of sale of said vessel now held in the registry of this Court, and such recovery shall be fourteenth in order.

39. That intervener Al Larson Boat Works acquired a maritime lien on respondent vessel and is entitled to recover the sum of $5.12 plus taxable costs in the sum of $....., such recovery from said proceeds of sale held in the registry of this Court shall be fifteenth in order.

40. That if the net proceeds of the sale of the respondent vessel shall be insufficient to pay the amounts awarded as aforesaid to interveners Al

Larson Boat Works, and Crofton Diesel Engine Company, Inc., with interest as provided by law, then judgment for such deficiency shall be entered against said respondents [129] Peter Radic and John Kremenic, jointly and severally, for the amount of such deficiency.

Dated July 30, 1951.

/s/ WM. C. MATHES,
United States District Judge.

Approved As to Form:

EKDALE &
SHALLENBERGER,

/s/ ARCH E. EKDALE.

HANSEN & SWEENEY,
R. D. SWEENEY,

By /s/ JOHN R. LINDLEY.

/s/ GEORGE M. STEPHENSON.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 31, 1951. [130]

In the District Court of the United States, Southern District of California, Central Division

In Admiralty—No. 12,271-WM

PUGET SOUND NATIONAL BANK OF TACOMA, a National Banking Corporation,

Libelant,

vs.

AMERICAN OIL SCREW FLYING CLOUD, Her Engines, Tackle, Apparatus, Boats, Furniture and Equipment; and PETER RADIC and JOHN KREMENIC,

Respondents.

CROFTON DIESEL ENGINE COMPANY, INC., a California Corporation; and AL LARSON BOAT SHOP, a California Corporation,

Interveners.

JOHN MARUMOTO,

Intervener.

ETS-HOKIN & GALVAN,

Intervener.

INTERLOCUTORY DECREE

The above-entitled matter came on regularly for trial as to all parties except intervener, John Marumoto, on July 9, 1951, in the above-entitled court, Honorable William C. Mathes, United States District Judge, presiding; Herbert R. Lande and Charles H. Kent [132] appearing as proctors for

libelant; Ekdale & Shallenberger by Arch E. Ekdale as proctors for interveners, Crofton Diesel Engine Company, Inc., and Al Larson Boat Works, a corporation; and Hansen & Sweeney by John R. Y. Lindley as proctors for intervener Ets-Hokin & Galvan, a corporation; and it appearing that the respondent vessel has been seized by the Marshal of this Court under a monition issued herein and sold under previous order of Court, the sale confirmed and the proceeds of sale deposited in Court; and it further appearing that a citation and copy of the libel of the interveners Crofton Diesel Engine Company, Inc., and Al Larson Boat Works has been served personally on the respondents Peter Radic and John Kremenic, and that they have failed to answer same or appear herein, and that default has been taken and entered against them by said interveners, and the default of all persons not appearing having been entered; and a stipulation having been filed by all parties appearing in this action that the sum of $3,500.00 of the funds on deposit in the registry of the above Court be withheld and remain undisbursed until the issues raised by the libel in intervention of John Marumoto and answer of Peter Radic and John Kremenic are settled or otherwise disposed of; and evidence oral and documentary having been taken and introduced by all parties so appearing and the cause having been submitted for decision, and written findings of fact and conclusions of law having been made and filed herein;

Now, Therefore, It Is Ordered, Adjudged and Decreed:

1. That the libelant, Puget Sound National Bank of Tacoma, do have and recover from the proceeds of sale of the respondent vessel Flying Cloud, now held in the registry of this Court, the sum of $23,-418.74, plus interest at 5% on $20,267.40 from July 1, 1951, to the date of this decree, and that such recovery shall be first in order. [133]

2. That the libelant, Puget Sound National Bank of Tacoma, do have and recover from the proceeds of sale of the respondent vessel, now held in the registry of this Court, the further sum of $10,-950.00, plus interest at 6% on $10,000.00 from July 1, 1951, to the the date of this decree, and that such recovery shall be second in order.

3. That the libelant, Puget Sound National Bank of Tacoma, do have and recover from the proceeds of sale of the respondent vessel, now held in the registry of this Court, the further sum of $3,500.00, and that such recovery shall be third in order.

4. That the libelant, Puget Sound National Bank of Tacoma, do have and recover from the proceeds of sale of the respondent vessel, now held in the registry of this Court, taxable costs in the sum of $1,486.73, and that such recovery shall be fourth in order.

5. That intervener, Al Larson Boat Works, do have and recover from the proceeds of sale of the respondent vessel, now held in the registry of this

Court, the sum of $1,013.06, and that such recovery shall be fifth in order.

6. That intervener, Ets-Hokin & Galvan, do have and recover from the proceeds of sale of the respondent vessel, now held in the registry of this Court, the sum of $36.97, and that such recovery shall be sixth in order.

7. That intervener, Crofton Diesel Engine Company, Inc., do have and recover from the proceeds of sale of the respondent vessel, now held in the registry of this Court, the sum of $229.27, and that such recovery shall be seventh in order.

8. That intervener, Ets-Hokin & Galvan, do have and recover from the proceeds of sale of the respondent vessel, now held in the registry of this Court, the further sum of $808.80, and that such recovery shall be eighth in order. [134]

9. That intervener, Al Larson Boat Works, do have and recover from the proceeds of sale of the respondent vessel, now held in the registry of this Court, the further sum of $1,664.89, and that such recovery shall be ninth in order.

10. That intervener, Crofton Diesel Engine Company, Inc., do have and recover from the proceeds of sale of the respondent vessel, now held in the registry of this Court, the further sum of $7,012.50, plus interest at 6% on $6,500.00 from July 1, 1951, to the date of this decree, and that such recovery shall be tenth in order.

11. That intervener, Crofton Diesel Engine Company, Inc., do have and recover from the proceeds of sale of the respondent vessel, now held in the registry of this Court, the further sum of $675.00, and that such recovery shall be eleventh in order.

12. That intervener, Crofton Diesel Engine Company, Inc., do have and recover from the proceeds of sale of the respondent vessel, now held in the registry of this Court, taxable costs in the further sum of $48.80, and that such recovery shall be twelfth in order.

13. That intervener, Al Larson Boat Works, do have and recover from the proceeds of sale of the respondent vessel, now held in the registry of this Court, the further sum of $455.14, and that such recovery shall be thirteenth in order.

14. That intervener, Al Larson Boat Works, do have and recover the further sum of $59.55, and intervener, Ets-Hokin & Galvan, do have and recover the further sum of $23.15, plus taxable costs in the sum of $....., from the proceeds of sale of the respondent vessel, now held in the registry of this Court, and that such recoveries shall share pro rata in the fourteenth order of [135] recovery.

15. That intervener, Al Larson Boat Works, do have and recover from the proceeds of sale of the respondent vessel, now held in the registry of this Court, the further sum of $5.12, plus taxable costs

in the sum of $....., and that such recovery shall be fifteenth in order.

16. That if the net proceeds of the sale of the respondent vessel shall be insufficient to pay the amounts awarded as aforesaid to interveners, Al Larson Boat Works and Crofton Diesel Engine Company, Inc., with interest as provided by law, then judgment for such deficiency shall be entered against said respondents Peter Radic and John Kremenic, jointly and severally, for the amount of such deficiency, in favor of said interveners.

It Is Further Ordered that of the funds in the registry of this Court, $3,500.00 shall be first withheld by the Clerk, and that distribution of the remaining funds shall be as above ordered; and that upon the final disposition of the issues raised by the libel of John Marumoto and answer thereto, any of the parties appearing herein, as above stated, may apply to the Court for an order of distribution thereof.

Costs taxed favor Ets-Hokin & Galvan at $53.65.

Dated July 30, 1951.

/s/ WM. C. MATHES,
United States District Judge.

Approved as to form:

EKDALE &
SHALLENBERGER,

ARCH E. EKDALE.

HANSEN & SWEENEY,
R. D. SWEENEY,
By /s/ JOHN R. Y. LINDLEY.
/s/ GEORGE M. STEPHENSON.

Receipt of copy acknowledged.

[Endorsed]: Filed July 31, 1951.

Docketed and entered August 3, 1951. [136]

In the District Court of the United States, Southern District of California, Central Division

In Admiralty—No. 12,271-WM

PUGET SOUND NATIONAL BANK OF TACOMA, a National Banking Corporation,
Libelant,

vs.

AMERICAN OIL SCREW FLYING CLOUD, Her Engines, Tackle, Apparatus, Boats, Furniture and Equipment; and PETER RADIC and JOHN KREMENIC,
Respondents.

CROFTON DIESEL ENGINE COMPANY, INC., a California Corporation; and AL LARSON BOAT SHOP, a California Corporation,
Interveners.

JOHN MARUMOTO,
Intervener.

ETS-HOKIN & GALVAN,
Intervener.

FINAL DECREE

The above-entitled matter came on regularly for trial as to all parties, except Intervener, John Marumoto, on July 19, 1951, in the above-entitled Court, Honorable William C. Mathes, United States District Judge, presiding; Herbert R. Lande and Charles H. [140] Kent appearing as proctors for Libelant; Ekdale & Shallenberger, by Arch E. Ekdale, as proctors for Interveners, Crofton Diesel Engine Company, Inc., and Al Larson Boat Shop, both corporations; and Hansen & Sweeney, by John R. Y. Lindley, as proctors for Intervener, Ets-Hokin & Galvan, a corporation; and it appearing that the respondent Vessel has been seized by the Marshal of this Court, under a monition issued herein, and sold under previous order of the Court, the sale confirmed and the proceeds of sale deposited in the registry of the Court; and it further appearing that a citation and copy of the libel of the Interveners, Crofton Diesel Engine Company, Inc., and Al Larson Boat Shop, has been served personally on the Respondents, Peter Radic and John Kremenic, and that they have failed to answer same, or appear herein, and that default has been taken and entered against them by said Interveners, and default of all persons having been entered; and a stipulation being filed by all parties in this action that the sum of Three Thousand Five Hundred and No/100 Dollars ($3,500.00) of the funds on deposit in the registry of the Court be withheld and remain undisbursed until the issues raised by the libel in intervention of John Marumoto are disposed of; and evidence, oral and documentary,

having been taken and introduced by all parties appearing, and the cause having been submitted for decision, and written findings of fact and conclusions of law having been made and filed herein, and an Interlocutory Decree having been signed and entered on August 3, 1951, leaving undisposed of the claim of John Marumoto, and the rank and priority thereof, and leaving undisposed of the proceeds held in the registry by stipulation for the satisfaction of any claim of John Marumoto, and leaving undecided the amount of any deficiency to which Interveners, Crofton Diesel Engine Company, Inc., and Al Larson Boat Shop, are entitled, and subsequent to the entry of said Interlocutory Decree, it appearing from the record that the Intervening Libel of John Marumoto has been dismissed, and the funds in the registry disbursed; [141] Thirty-Nine Thousand Five Hundred Three and 36/100 Dollars ($39,503.36) to Puget Sound National Bank of Tacoma, and Nine Hundred Seventy-One and 29/100 Dollars ($971.29) to Al Larson Boat Shop.

Now, Therefore, It Is Ordered, Adjudged and Decreed:

1. That the Findings of Fact and Conclusions of Law heretofore made be adopted, and that the Interlocutory Decree heretofore entered thereon be adopted, and the order of priority of claims of parties set forth therein, confirmed;

And It Is Further Ordered, Adjudged and Decreed:

1. That John Marumoto take nothing by his Libel in Intervention;

2. That the Intervener, Al Larson Boat Shop, have judgment in personam against Peter Radic and John Kremenic, and each of them, in personam, in the sum of Two Thousand Two Hundred Twenty-Six and 47/100 Dollars ($2,226.47).

3. That the Intervener, Crofton Diesel Engine Company, Inc., have judgment in personam against Peter Radic and John Kremenic, and each of them, in personam, in the sum of Seven Thousand Nine Hundred Ninety-Eight and 22/100 Dollars ($7,998.22).

Signed and dated this 5th day of October, 1951.

/s/ WM. C. MATHES,
Judge of the United States District Court.

Approved as to form:

HERBERT R. LANDE,
CHAS. H. KENT,
HERBERT R. LANDE,
Attorney for Libelant.

HANSEN & SWEENEY,
By /s/ JOHN R. Y. LINDLEY,
Attorneys for Ets-Hokin & Galvan.

EKDALE & SHALLENBERGER,
By /s/ GORDON P. SHALLENBERGER,
Attorneys for Crofton Diesel Engine Co. and Al Larson Boat Shop.

[Endorsed]: Filed October 8, 1951.

Docketed and entered October 8, 1951. [142]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To: The Honorable William C. Mathes, Judge of the United States District Court for the Southern District of California, Central [143] Division:

The Interveners, Crofton Diesel Engine Company, Inc., a California corporation, and Al Larson Boat Shop, a California corporation, respectfully pray that they may be permitted to take an appeal from the Final Decree, and the whole thereof, entered in the above-entitled matter by the above Court, on the 8th day of October, 1951, to the United States Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and that a citation may issue.

Dated at San Pedro, California, this 25th day of October, 1951.

EKDALE &
SHALLENBERGER,

By /s/ ARCH E. EKDALE,
Proctors for Interveners.

Affidavit of Service by mail attached.

[Endorsed]: Filed October 29, 1951. [144]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes Now, the Interveners, Crofton Diesel Engine Company, Inc., a California corporation, and Al Larson Boat Shop, a California corporation, and make the following assignment of [146] errors:

I.

The District Court erred in finding that it is true that the Mortgage of the Libelant, Puget Sound National Bank of Tacoma, a national banking corporation, did not stipulate that the Mortgagee waived the preferred status thereof.

II.

The District Court erred in finding that it is true that the Mortgage of Kazulin Cole Shipbuilding Corporation, assigned to the Libelant, did not stipulate that the Mortgagee waived the preferred status thereof.

III.

The District Court erred in not finding that the Mortgagee, Puget Sound National Bank of Tacoma, a national banking corporation, and the Mortgagee, Kazulin Cole Shipbuilding Corporation, had waived the preferred status of their Mortgages in so far as the maritime liens of the mentioned Interveners were concerned.

IV.

The District Court erred in not finding that the

Puget Sound National Bank of Tacoma, a national banking corporation, and Kazulin Cole Shipbuilding Corporation, were estopped from asserting the priority of their Mortgage liens over the mentioned Interveners.

V.

The District Court erred in not finding that the Third Preferred Ship's Mortgage of Intervener, Crofton Diesel Engine Company, Inc., a California corporation, was in fact the first preferred mortgage.

VI.

The District Court erred in concluding that the liens of the Mortgagees, Puget Sound National Bank of Tacoma, a national banking corporation, and Kazulin Cole Shipbuilding Corporation, [147] were preferred to and prior to the liens of the mentioned Interveners.

Respectfully submitted,

EKDALE &
SHALLENBERGER,

By /s/ ARCH E. EKDALE,
Proctors for Interveners.

Affidavit of Service by mail attached.

[Endorsed]: Filed October 29, 1951. [148]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

The Petition of the Interveners, Crofton Diesel Engine Company, Inc., a California corporation, and Al Larson Boat Shop, a California corporation, for an appeal from the Final Decree in [150] the above-entitled cause, entered on October 8, 1951, is hereby granted, and the appeal is allowed.

Dated at Los Angeles, California, this 27th day of October, 1951.

/s/ WM. C. MATHES,
United States District Judge.

[Endorsed]: Filed October 29, 1951. [151]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Puget Sound National Bank of Tacoma, a national banking corporation, and Herbert R. Lande and Charles H. Kent, its Attorneys, and to Ets-Hokin & Galvan, and Hansen & Sweeney, its Attorneys: [152]

The Interveners, Crofton Diesel Engine Company, Inc., a California corporation, and Al Larson Boat Shop, a California corporation, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Final Decree, and the whole thereof, entered on October 8, 1951, in favor of the

Libelant and Interveners and against the Respondents.

Dated Nov. 1, 1951.

EKDALE &
SHALLENBERGER,

By /s/ ARCH E. EKDALE,
Proctors for Interveners.

Affidavit of Service by mail attached.

[Endorsed]: Filed November 2, 1951. [153]

[Title of District Court and Cause.]

CITATION

United States of America—ss.

To: Puget Sound National Bank of Tacoma, a national banking corporation, Libelant, and Ets-Hokin & Galvan, Intervener, [155]

Greeting:

You are hereby cited and admonished to be and appear at the United States Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 12th day of December, 1951, pursuant to an order allowing appeal filed on October 27th, 1951, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause No. 12,271-WM, Central Division, wherein Crofton Diesel Engine Company, Inc., a

California corporation, and Al Larson Boat Shop, a California corporation, are Appellants, and Puget Sound National Bank of Tacoma, a national banking corporation, is Appellee, to show cause, if any there be, why the decree, order or judgment in the said appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William C. Mathes, United States District Judge for the Southern District of California, this 2nd day of November, A.D. 1951, and of the Independence of the United States, the 175th.

/s/ WM. C. MATHES,
United States District Judge for the Southern District of California.

Service of a copy of the foregoing Citation is acknowledged this 8th day of November, 1951.

HERBERT R. LANDE and
CHAS. H. KENT,
By /s/ HERBERT R. LANDE,

R. D. SWEENEY,
By /s/ JOHN R. Y. LINDLEY.

[Endorsed]: Filed November 15, 1951. [156]

[Title of District Court and Cause.]

STIPULATION

It is agreed that the attached Statement, "Agreed Statement of Facts on Appeal in Lieu of Reporter's Transcript," is agreed to in fact and is to be used in lieu of the Reporter's transcript; [157] that the designation of record shall consist of all pleadings, orders and decrees, inclusive of interrogatories and answers to interrogatories, Requests for Admissions, and Answers thereto, the Findings of Fact and Conclusions of Law, and the following Exhibits:

(1) Libelant's preferred ship's mortgages

(2) The note and preferred mortgage of Crofton

(3) The statements of account of the interested parties heretofore introduced as exhibits in the court below

(4) Certificate of Ownership.

Dated December .., 1951.

HERBERT R. LANDE and
CHARLES H. KENT,

By /s/ HERBERT R. LANDE,
Proctors for Libelant.

HANSEN & SWEENEY,

By /s/ JOHN R. Y. LINDLEY,
Proctors for Ets-Hokin &
Galvan.

EKDALE, SHALLENBERGER & TONER,

By /s/ GORDON P. SHALLENBERGER,

Proctors for Crofton Diesel Engine Company, Inc., and Al Larson Boat Shop. [158]

[Title of District Court and Cause.]

AGREED STATEMENT OF FACTS ON APPEAL IN LIEU OF REPORTER'S TRANSCRIPT

The above-entitled matter came on regularly for trial as to all parties, except Intervener, John Marumoto, on July 9, 1951, default of Respondents, Peter Radic and John Kremenic, having been [159] entered. The claim of Intervener, John Marumoto, has since been disposed of out of court and is of no concern in this appeal.

The Respondent Vessel, the Oil Screw Flying Cloud, was at all times an American fishing Vessel, duly enrolled and documented under the laws of the United States at Tacoma, State of Washington, and that the Home Port of said vessel was Tacoma, Washington; that said vessel was owned fifty per cent (50%) by Peter Radic and fifty per cent (50%) by John Kremenic.

That on August 18, 1948, said Peter Radic and John Kremenic executed their promissory note in the sum of Twenty-Five Thousand and No/100 Dollars ($25,000.00) to the Libelant, who was at

that time and still is a national banking corporation and a citizen of the United States, payable on October 31, 1949, with interest at five per cent (5%) per annum, and providing for attorney's fees, etc., as will more fully appear from the said note itself, designated as part of the record and incorporated herein by reference.

That on August 18, 1948, the said Peter Radic and John Kremenic executed a mortgage upon the whole of said vessel Flying Cloud in favor of Libelant, to secure the payment of said note for Twenty-Five Thousand and No/100 Dollars ($25,000.00); that said mortgage provided that it was also given to secure the terms of the said promissory note; that said mortgage contained other provisions as will more fully appear from the said mortgage itself, designated as a part of the record and incorporated herein by reference.

That the sum of Four Thousand Seven Hundred Thirty-Two and 60/100 Dollars ($4,732.60) has been paid upon the principal of said note, and that the balance due, owing and unpaid is Twenty Thousand Two Hundred Sixty-Seven and 40/100 Dollars ($20,267.40); that interest on said note has been paid to October 31, 1949; that interest from November 1, 1949, to June 30, 1951, amounts to One Thousand Six Hundred Eighty-Eight and 95/100 Dollars ($1,688.95), [160] and that said interest is due, owing and unpaid to the Libelant.

That said mortgage on the Respondent Vessel was recorded at Tacoma, State of Washington, on August 18, 1948, by the Collector of Customs at

Tacoma; that said mortgage was endorsed on the outstanding document of said vessel on August 24, 1948, by the Collector of Customs at Los Angeles, State of California, by request of the Collector of Customs at Tacoma, Washington, and that an affidavit was made by Peter Radic and John Kremenic and filed with the record at Tacoma, that the said mortgage was made in good faith.

That on August 18, 1948, said Peter Radic and John Kremenic executed their promissory note in the sum of Ten Thousand and No/100 Dollars ($10,000.00) to the Kazulin Cole Shipbuilding Corporation, payable on November 30, 1949, with interest at six per cent (6%) per annum, and providing for attorney's fees, etc., as will more fully appear from the said note itself designated as part of the record and incorporated herein by reference.

That on August 18, 1948, the said Peter Radic and John Kremenic executed a mortgage upon the whole of said Vessel Flying Cloud in favor of the Kazulin Cole Shipbuilding Corporation, at all times a citizen of the United States, to secure the payment of said note for Ten Thousand and No/100 Dollars ($10,000.00); that said mortgage provided that it was also given to secure the terms of said promissory note.

That no sum has been paid upon the principal of said note, and that the balance due, owning and unpaid is Ten Thousand and No/100 Dollars ($10,000.00); that interest on said note has been paid to November 30, 1949; that interest from December 1, 1949, to June 30, 1951, amounts to Nine Hundred

Fifty and No/100 Dollars ($950.00); and that said interest is due, owning and unpaid to the Libelant.

That said mortgage on the Respondent vessel was recorded [161] at Tacoma, State of Washington, on August 19, 1948, by the Collector of Customs at Tacoma; that said mortgage was endorsed on the outstanding document of said vessel on August 24, 1948, by the Collector of Customs at Los Angeles by request of the Collector of Customs at Tacoma, Washington; and that an affidavit was made by Peter Radic and John Kremenic and filed with the record of the mortgage at Tacoma, that the said mortgage was made in good faith.

That on October 19, 1949, the said Kazulin Cole Shipbuilding Corporation assigned said preferred mortgage to the Libelant herein, and that said assignment was recorded at the Custom House, Tacoma, Washington, on March 23, 1950, and that said assignment was endorsed on the document of the Respondent Vessel on March 24, 1950, by the Collector of Customs at Los Angeles, by request of the Collector of Customs at Tacoma, Washington.

That on May 9, 1950, said Peter Radic and John Kremenic executed their promissory note in the sum of Six Thousand Five Hundred and No/100 Dollars ($6,500.00) to Intervener, Crofton Diesel Engine Company, Inc., a corporation, who was at that time and still is a citizen of the United States, payable on or before May 1, 1952, with interest at six per cent (6%) per annum, and providing for attorney's fees, etc., as will more fully appear from

the said note itself, designated as part of the record and incorporated herein by reference.

That on May 9, 1950, the said Peter Radic and John Kremenic executed a third mortgage upon the whole of said vessel Flying Cloud in favor of Intervener, Crofton Diesel Engine Company, Inc., to secure the payment of said note for Six Thousand Five Hundred and No/100 Dollars ($6,500.00); that said mortgage provided that it was also given to secure the terms of the said promissory note; that said mortgage contained other provisions as will more fully appear from the said mortgage itself, designated as a part of the record and incorporated herein by reference. [162]

That no sums have been paid upon the principal of said note; that said Intervener, Crofton Diesel Engine Company, Inc., furnished supplies and materials to the Mortgagors, Peter Radic and John Kremenic, in the sum of Two Hundred Twenty-Nine and 27/100 Dollars ($229.27), no part of which has been paid; that there is due, owing and unpaid to Intervener, Crofton Diesel Engine Company, Inc., the sum of Six Thousand Seven Hundred Twenty-Nine and 27/100 Dollars ($6,729.27); that no sums have been paid upon the interest of said note; that interest to June 30, 1951, amounts to Five Hundred Twelve and 50/100 Dollars ($512.50), and that said interest is due, owing and unpaid to said Intervener.

That said third mortgage to Intervener, Crofton Diesel Engine Company, Inc., was recorded in the Office of the Collector of Customs at Tacoma, Wash-

ington, on May 29, 1950, and was endorsed on the outstanding document of the respondent vessel; that an affidavit of good faith was made by Peter Radic and John Kremenic and filed with the said record of said mortgage.

That the reasonable value of the services of the proctors for the Libelant herein is the sum of Three Thousand Five Hundred and No/100 Dollars ($3,500.00).

That the reasonable value of the services of the proctors for the Intervener, Crofton Diesel Engine Company, Inc., is the sum of Six Hundred Seventy-Five and No/100 Dollars ($675.00).

That Intervener, Al Larson Boat Shop, furnished work and materials to the Respondent Vessel for current operations and repairs in the sum of Three Thousand Four Hundred Ninety-Seven and 76/100 Dollars ($3,497.76), of which Three Hundred and No/100 Dollars ($300.00) was paid on March 1, 1950, and that Three Thousand One Hundred Ninety-Seven and 76/100 Dollars ($3,197.76) is now due, owing and unpaid said Intervener.

That Intervener, Ets-Hokin & Galvin, furnished labor and material to the Respondent Vessel for current operations and [163] repairs in the sum of Eight Hundred Sixty-Seven and 92/100 Dollars ($867.92), no part of which has been paid and which is now due, owing and unpaid said Intervener.

That the sequence of supplies, materials and labor furnished to the said Respondent Vessel by the Interveners was as follows:

Furnished After Date of Libelant's Mortgages:

(a) Al Larson Boat Shop.....$1,013.06
(b) Ets-Hokin & Galvan..... 35.97
(c) Crofton Diesel Engine Company, Inc 229.27
(d) Ets-Hokin & Galvan..... 808.80
(e) Al Larson Boat Shop..... 1,664.89

Furnished After Mortgage of Intervener, Crofton Diesel Engine Company, Inc.:

(f) Al Larson Boat Shop.....$455.14
(g) Al Larson Boat Shop..... 59.55
and
Ets-Hokin & Galvan..... 23.15
furnished contemporaneously
(h) Al Larson Boat Shop..... 5.12

Dated: December...., 1951.

HERBERT R. LANDE and
CHARLES H. KENT,
By /s/ HERBERT R. LANDE,
Proctors for Libelant.

HANSEN & SWEENEY,
By /s/ JOHN R. Y. LINDLEY,
Proctors for Ets-Hokin & Galvan.

EKDALE, SHALLENBERGER & TONER,
By /s/ GORDON P. SHALLENBERGER,
Proctors for Crofton and Larson.

[Endorsed]: Filed December 11, 1951. [164]

[Title of District Court and Cause.]

AFFIDAVIT OF GORDON P. SHALLENBERGER

State of California,
County of Los Angeles—ss.

Gordon P. Shallenberger, being first duly sworn, deposes and says: [165]

That he is one of the proctors for the Interveners, Crofton Diesel Engine Company, Inc., and Al Larson Boat Shop, in the above-entitled matter; that your Affiant is advised by the office of the Clerk of the above-entitled Court that it will be necessary to have a thirty-day extension of time within which to file the Apostles on Appeal in the above-entitled case.

Wherefore, Affiant requests that the above Court make an Order extending the time within which to file the Apostles on Appeal in the above matter to and including the 11th day of January, 1952.

/s/ GORDON P.
SHALLENBERGER.

Suscribed and sworn to before me this 10th day of December, 1951.

[Seal] /s/ I. G. PIEPER,
Notary Public in and for the County of Los Angeles, State of California,

Affidavit of service by mail attached.

[Endorsed]: Filed December 11, 1951. [166]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE APOSTLES ON APPEAL

Upon application of Gordon P. Shallenberger, one of the Proctors for Interveners, Crofton Diesel Engine Company, Inc., and Al Larson Boat Shop, and good cause appearing therefor, [168]

It Is Hereby Ordered, that Interveners, Crofton Diesel Engine Company, Inc., and Al Larson Boat Shop, have to and including the 11th day of January, 1952, within which to file the Apostles on Appeal in the above matter.

Dated: December 11th, 1951.

/s/ LEON R. YANKWICH,
Judge of the United States
District Court.

Affidavit of service by mail attached.

[Endorsed]: Filed December 11, 1951. [169]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 170, inclusive, contain the original Libel; Libel in Intervention; Answer of Crofton

Diesel Engine Company, Inc., et al., to Libel with Attached Interrogatories; Separate Answers of Libelant to Interrogatories; Separate Interrogatories of Libelant to Interveners; Separate Admission of Interveners Under Supreme Court Admiralty Rule 32-B; Claim; Separate Answers of Interveners to Libelant's Interrogatories; Request of Libelant for Admission Under Supreme Court Admiralty Rule 32-B; Offer to Stipulate; Libelant's Partial Acceptance of Offer to Stipulate; Request for Admission; Separate Answer of Interveners to Request for Admissions; Memoradum to Counsel; Separate Amended Answer of Interveners to Request for Admission; Order for Findings and Decree; Findings of Fact and Conclusions of Law; Interlocutory Decree; Order for Dismissal; Final Decree; Petition for Appeal; Assignment of Errors; Order Allowing Appeal; Notice of Appeal; Citation; Stipulation as to Apostles on Appeal and Agreed Statement of Facts; Affidavit of Gordon P. Shallenberger and Order Extending Time to File Apostles on Appeal which, together with original Libelant's Exhibits 6, 7, 8, 9, 10 and 11; original Crofton Exhibits A, B and C; original Ets-Hokin Exhibit A and Original Larson Exhibit A, transmitted herewith, constitute the Apostles on Appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing Apostles amount to $2.00, which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 7 day of January, A.D. 1952.

[Seal]: EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13225. United State Court of Appeals for the Ninth Circuit. Crofton Diesel Engine Company, Inc., a corporation, and Al Larson Boat Shop, a corporation, Appellants, vs. Puget Sound National Bank of Tacoma, a corporation, and Ets-Hokin & Galvin, Appellees. Apostles on Appeal. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed January 8, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 13225

CROFTON DIESEL ENGINE COMPANY, INC., a California Corporation, and AL LARSON BOAT SHOP, a California Corporation,
Appellants,

vs.

PUGET SOUND NATIONAL BANK OF TACOMA, a National Banking Corporation,
Appellee.

APPELLANTS' STATEMENT OF POINTS

The following is a statement of the points upon which Appellants intend to rely upon their appeal herein:

1. The District Court erred in finding that the mortgages held by Appellee were preferred mortgages.

2. The District Court erred in finding that Appellee did not, by the terms of their mortgages, waive the preferred status of said mortgages.

3. The District Court erred in not finding that Appellant Crofton Diesel Engine Company, Inc., had a valid maritime lien for goods, wares and services to the vessel on order of the Respondent owners.

4. The District Court erred in not finding that the note and preferred mortgage held by Crofton Diesel Engine Company, Inc., was given by the

owners as security for the maritime lien for goods, wares and services furnished by Crofton Diesel Engine Company, Inc., to the boat on order of the owners.

5. The District Court erred in its conclusion of law that Appellee's mortgages and the fee of Appellee's Attorney were senior to Appellants' liens.

6. The District Court erred in its Interlocutory Decree by ordering (from the proceeds of the sale of the Respondent Flying Cloud, held in the registry of the District Court) recovery as follows:

(a) By Appellee of the sum of Twenty-Three Thousand Four Hundred Eighteen and 74/100 Dollars ($23,418.74) plus interest at five per cent (5%) on Twenty Thousand Two Hundred Sixty-Seven and 40/100 Dollars ($20,-267.40) from July 1, 1951, first in order;

(b) By Appellee of the sum of Ten Thousand Nine Hundred Fifty and No/100 Dollars ($10,950.00), plus interest at six per cent (6%) on Ten Thousand and No/100 Dollars ($10,-000.00) from July 1, 1951, second in order;

(c) By Appellee of Three Thousand Five Hundred and No/100 Dollars ($3,500.00), third in order;

(d) By Appellee of taxable costs, fourth in order; and in not ordering that said recoveries were subsequent to recoveries ordered by Appellants from said proceeds.

7. The District Court erred by ordering by its Final Decree that Thirty-Nine Thousand Five Hun-

dred Three and 36/100 Dollars ($39,503.36) be disbursed to Appellee, and Nine Hundred Seventy-One and 29/100 Dollars ($971.29) to Appellant Al Larson Boat Shop.

8. The District Court erred in not finding that the preferred mortgage of Appellant Crofton Diesel Engine Company, Inc., was the first preferred mortgage, and junior only to:

(a) The maritime lien of Appellant Al Larson Boat Shop in the sum of One Thousand Thirteen and 06/100 Dollars ($1,013.06);

(b) The maritime lien of Appellant Crofton Diesel Engine Company, Inc., in the sum of Two Hundred Twenty-Nine and 27/100 Dollars ($229.27);

(c) The maritime lien of Appellant Al Larson Boat Shop in the sum of One Thousand Six Hundred Sixty-Four and 89/100 Dollars ($1,664.89);

and senior to:

(a) The maritime lien of Appellant Al Larson Boat Shop in the sum of Fifty-Five and 14/100 Dollars ($55.14);

(b) The maritime lien of Appellant Al Larson Boat Shop in the sum of Fifty-Nine and 55/100 Dollars ($59.55);

(c) The maritime lien of Appellant Al Larson Boat Shop in the sum of Five and 12/100 Dollars ($5.12);

(d) Appellee's mortgages, including the sum of One Thousand Four Hundred Sixty-

Two and 39/100 Dollars ($1,462.39) advanced for insurance premiums and the sum of Three Thousand Five Hundred and No/100 Dollars ($3,500.00) for Attorney's fees and taxable costs.

Respectfully submitted,

EKDALE, SHALLENBERGER & TONER,

By /s/ G. E. TONER
Proctors for Appellants.

Service of Copy acknowledged.

[Endorsed]: Filed January 16, 1952.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated and Agreed by and between the respective parties, by Ekdale, Shallenberger & Toner, Proctors for the Appellants, and Herbert R. Lande and Charles H. Kent, Proctors for the Appellees, that the original Exhibits in this case need not be printed, but may be referred to by Proctors for the respective parties, and may be considered by the Court in their original form.

Dated this 14 day of January, 1952.

EKDALE, SHALLENBERGER & TONER,

By /s/ G. E. TONER,
Proctors for Appellants.

HERBERT R. LANDE and
CHARLES H. KENT,

By /s/ HERBERT R. LANDE,
Proctors for Appellee.

Upon Stipulation of the parties, and good cause appearing therefor;

It Is Ordered that the original Exhibits in this appeal need not be printed, but may be referred to by Proctors for the respective parties, and will be considered by this Court in their original form.

Dated at San Francisco, California, this 16th day of January, 1952.

/s/ WILLIAM DENMAN,
Senior Judge of the United States Court of Appeals for the Ninth Circuit.

/s/ WILLIAM HEALY,

/s/ HOMER T. BONE,
Judges, U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed January 18, 1952.

No. 13225

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CROFTON DIESEL ENGINE COMPANY, INC., a corporation, and AL LARSON BOAT SHOP, a corporation,

Appellants,

vs.

PUGET SOUND NATIONAL BANK OF TACOMA, a corporation, and ETS-HOKIN & GALVAN,

Appellees.

OPENING BRIEF FOR APPELLANTS.

EKDALE, SHALLENBERGER & TONER,
ARCH E. EKDALE,
GORDON P. SHALLENBERGER,
GEORGE E. TONER,
614 South Pacific Avenue,
San Pedro, California,
Proctors for Appellants.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

TABLE OF AUTHORITIES CITED

PAGE

STATUTES

TEXT AUTHORITIES

No. 13225

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CROFTON DIESEL ENGINE COMPANY, INC., a corporation, and AL LARSON BOAT SHOP, a corporation,

Appellants,

vs.

PUGET SOUND NATIONAL BANK OF TACOMA, a corporation, and ETS-HOKIN & GALVAN,

Appellees.

OPENING BRIEF FOR APPELLANTS.

This appeal is from a final decree in Admiralty of the United States District Court for the Southern District of California, Central Division, Honorable William C. Mathes, presiding, which adjudged that certain valid maritime liens and preferred mortgage liens existed upon a fishing Vessel, FLYING CLOUD, and ordered recovery in certain amounts by Appellee, Puget Sound National Bank of Tacoma and Appellant Al Larson Boat Shop from proceeds of the sale of the Vessel held in the registry of the Court. This controversy is between Appellants, maritime lien holders, and Puget Sound National Bank of Tacoma, whose preferred mortgages were adjudged senior to Appellants' liens; Appellee Puget Sound National Bank of Tacoma was allowed to satisfy its claims from the proceeds of the sale, with a small balance to one of Appellants; the balance of Appellants' claims were reduced to worthless personal judgments. This appeal followed.

Summary of the Pleadings.

The original action was by Appellee, Puget Sound National Bank of Tacoma, as Libelant against the American Oil Screw FLYING CLOUD, her engines, tackle, apparatus, boats, furniture and equipment, and Peter Radic and John Kremenic, her owners, for foreclosure of two preferred mortgages. Appellant Crofton Diesel Engine Company, Inc., hereinafter referred to as "Appellant Crofton," and Appellant Al Larson Boat Shop, hereinafter referred to as "Appellant Larson," intervened, setting up their maritime liens and Appellant Crofton's preferred ship's mortgage; Ets-Hokin & Galvan intervened, setting up maritime liens; John Marumoto intervened, setting up a salvage lien (Ets-Hokin & Galvan and John Marumoto have not appealed, and their presence in the case will henceforth be desregarded). The original Respondents did not appear. Their defaults were taken. The Vessel was duly sold by the Marshal under Admiralty Rule 12 for forty-one thousand and no/100 dollars ($41,000.00), and the proceeds deposited in the registry of the Court. After trial, the District Court made an Order for Findings and Decree [A. 72] by which he ordered:

1. Foreclosure of Appellee's Preferred mortgages plus an additional sum of one thousand four hundred sixty-two and 39/100 dollars ($1,462.39) for insurance premiums and three thousand five hundred and no/100 dollars ($3,500.00) for Attorneys' fees;

2. Foreclosure of Appellant Crofton's preferred mortgage, plus an additional six hundred seventy-five and no/100 dollars ($675.00) for Attorneys' fees, and an award of two hundred twenty-nine and 27/100 dollars ($229.27) for supplies and materials;

3. An award of three thousand one hundred ninety-seven and 76/100 dollars ($3,197.76) to Appellant Larson;

and fixed priorities as follows:

1. All claims secured by Appellee's first and second preferred mortgages, including the sum of one thousand four hundred sixty-two and 39/100 dollars ($1,462.39) advanced to cover insurance premiums, taxable costs, and three thousand five hundred and no/100 dollars ($3,500.00) for Attorneys' fees;

2. The claim of Appellant Larson for one thousand thirteen and 06/100 dollars ($1,013.06);

3. The claim of Appellant Crofton for two hundred twenty-nine and 27/100 dollars ($229.27);

4. The claim of Appellant Larson for one thousand six hundred sixty-four and 89/100 dollars ($1,664.89);

5. All claims secured by the mortgage of Appellant Crofton, including the sum of six hundred seventy-five and no/100 dollars ($675.00) for Attorneys' fees;

6. The claim of Appellant Larson for fifty-five and 14/100 dollars ($55.14);

7. The claim of Appellant Larson for fifty-nine and 55/100 dollars ($59.55);

8. The claim of Appellant Larson for five and 12/100 dollars ($5.12).

Findings of Fact and Conclusions of Law [A. 74] were entered, and by the Interlocutory Decree [A. 87] and Final Decree [A. 94] it was decreed that there was to be paid from the funds in the Registry of the Court, the sum of thirty-nine thousand five hundred three and 36/100 dollars ($39,503.36) to Appellee, and the sum of nine hundred seventy-one and 29/100 dollars ($971.29) to Appellant Larson. Appellant Larson was awarded an *in personam* deficiency judgment in the sum of two thousand two hundred twenty-six and 47/100 dollars ($2,226.47) against the defaulting owners; Appellant Crofton was awarded a similar judgment in the sum of seven thousand nine hundred ninety-eight and 22/100 dollars ($7,998.22).

Appellants Crofton and Larson have appealed.

Statement as to Jurisdiction.

Admitted allegations in the pleadings show that the causes set forth in the libel and intervening libel are for foreclosure of preferred ship's mortgages and maritime liens, of which the District Court had jurisdiction by virtue of the constitutional grant of Admiralty Jurisdiction (Art. III, Sec. 2); Chapter 85 of the Judicial Code (28 U. S. C. A., Sec. 1333(1)); and the exclusive grant of jurisdiction of the Ship Mortgage Act (46 U. S. C. A., Sec. 951). The jurisdiction of this Court to review the final decree of the Court rests upon Chapter 83 of the Judicial Code (28 U. S. C. A., Sec. 1291), Assignments of Error [A. 98], Petition for Appeal [A. 97], Order Allowing Appeal [A. 100], Notice of Appeal [A. 100], Citation on Appeal [A. 101], all duly served and filed within the statutory period.

Statutory Background.

The Statutes which Appellants consider applicable are the following sections of the Ship Mortgage Act, 1920 (46 U. S. C. A., Secs. 911-984), particularly:

922. Preferred Mortgages.

953. Preferred Maritime lien; priorities; other liens.

971. Persons entitled to lien.

972. Persons authorized to procure repairs, supplies and necessaries.

973. Notice to person furnishing repairs, supplies and necessaries.

974. Waiver of right to lien.

These sections are quoted verbatim in the Appendix.

Statement of Facts.

Appellee took from the owners of the Fishing Vessel FLYING CLOUD, as security for a note, a certain mortgage on the Vessel [Libelant's Exhibit 7] on Treasury Department printed form No. 1348 [Libelant's Answer to Interrogatory No. 3; A. 56] completing the blanks and typing the word "Preferred" ahead of the printed words "Mortgage of Vessel." Kazulin Cole Shipbuilding Corporation also took a similar mortgage, on an identical form, as security for a loan [Libelant's Exhibit 8]. In both of these mortgages, there appears the following provision:

> "But if default be made in such payments, or in any one of such payments, or if default be made in

> the prompt and faithful performance of any of the covenants herein contained, or if the said party of the second part (Appellee) shall at any time deem itself in danger of losing its debt . . . or if said first part*ies* shall suffer and permit said vessel to be run in debt to an amount exceeding in the aggregate the sum of *a reasonable sum for strictly current operation and repairs to be kept currently paid within 30 days of the date incurred* . . . the second party is hereby authorized to take possession of said goods" etc. (Italics indicate typewritten matter inserted in printed form.)

It is important that the mortgagors in possession of the vessel were not specifically prohibited by the forms of these mortgages from incurring liens for goods, wares and services. On the contrary, expressly or by implication, from the requirement to pay within thirty days a "reasonable sum for strictly current operation and repairs," they are specifically authorized to "run the vessel in debt."

These "preferred" mortgages were duly recorded on August 19, 1948, at 4:15 P. M. and 4:20 P. M. respectively, at the office of Collector of Customs, Tacoma, Washington.

On October 19, 1949, Kazulin-Cole Shipbuilding Corporation assigned its note and mortgage to Appellee, Puget Sound National Bank of Tacoma.

Subsequently, Appellants Larson and Crofton supplied the Vessel with goods, wares and services on order of the

Vessel's owners. (Intervener-Appellants' Offer to Stipulate [A. 67], paragraphs 5 and 6; and Libelant-Appellee's Acceptance (Partial) of Offer to Stipulate [A. 71] paragraph 1.)

Appellant Crofton, while the Vessel was being "run in debt" took a note for six thousand five hundred and no/100 dollars ($6,500.00) and preferred ship's mortgage [Crofton's Exhibit "A"] as security for the liens for goods, wares and merchandise it had furnished (see offer to Stipulate, paragraph 5, and Acceptance (Partial)) [A. 67 and 71]. The time schedule and itemized list of Appellants' maritime liens appears in the District Court's Findings of Fact and Conclusions of Law [A. 74, par. 24; A. 81].

It is important that Appellant Crofton's preferred ship's mortgage contains, as does any well drawn preferred ship's mortgage, the following specific, unambiguous prohibition of the authority of the owner-mortgagor in possession to incur any liens [see Crofton's Exhibit "A," Art. V, which appears also [at A. 38] as an Exhibit to Libel in Intervention]:

> "Article V. That neither the mortgagors nor the master of the vessal shall have any right, power or authority to create, incur, or permit to be placed or imposed on the vessel any liens whatsoever other than for crew's wages, wages of stevedores and salvage. The mortgagors shall carry a properly certified copy of this mortgage with the ship's papers and shall exhibit the same to any person having business with the said vessel which might give rise to any

lien other than for crew's or stevedores' wages or salvage."

Upon default in payments by the owners, Appellee-Libelant libeled the Vessel to foreclose its mortgages and Appellant intervened to foreclose their maritime liens and preferred ship's mortgage.

Questions Involved.

The only question involved is as to the priority of Appellants' or Appellee's liens. Are Appellants' liens senior to Appellee's mortgages?

Appellants believe that the answers to the following questions determine this appeal:

1. Is the Appellee's mortgage a "preferred" ship's mortgage?

2. If so, are the Mortgagor-owners in possession authorized by the terms of the mortgage to incur maritime liens on the vessel for goods, wares and services furnished by Appellants on the credit of the Vessel at the request of the owners?

3. Does Appellee, by the terms of its mortgage, waive whatever preferred status it might have had to Appellants' maritime liens?

4. Do the same principles applicable to charter party cases and other similar situations require a preferred ship's mortgage expressly to prohibit the mortgagor-owner in possession of a Vessel from incurring liens for credit extended to the Vessel?

Summary of Argument.

There are no disputed issues of fact in this case. The only question, one of law, is whether upon the agreed facts the Appellants' maritime liens for goods, wares and services are junior or senior to Appellee's two mortgage liens. There is, therefore, little, if any, presumption in favor of the correctness of the District Court's decree. Appellants have only the usual burden that goes with being an Appellant.

We have here a conflict between the supplier who furnishes goods, wares and services upon order of the person in possession of a vessel, and the mortgagee under a document he hopes is a preferred mortgage. Both types of liens are protected by statute.

This contest of liens is identical to the well recognized conflict between the supplier and the owner of a vessel, who has chartered it. The supplier seeks the credit of the vessel while the owner seeks to limit the charterer to operation on his own credit. The well recognized rule in this Court and in the Supreme Court, is that the supplier's rights are junior to the owner's, if the charter party has specifically prohibited the person in possession from incurring liens. The supplier is bound to ascertain the authority of the person in possession. The same rule of thumb is applied in conditional sales, consignment cases, and mortgage cases. All a mortgagee, conditional vendor, or chartering owner need do is include a simple and clear prohibitory clause in the document by which a person is placed on a vessel as ostensible owner.

If the person in possession is authorized, expressly or by implication, to create liens, the supplier's lien is entitled to precedence. The supplier is, of course, bound

by the terms of the mortgage or other agreement, whether he knows of its terms or not, because he is required to exercise due diligence to ascertain the authority of the person with whom he deals. In this case, the persons in possession were, expressly or by implication, authorized to incur liens on the vessel by the inclusion in the mortgage of words amplifying an "acceleration" clause. If the mortgagors "run the vessel in debt" in an amount exceeding a "reasonable sum for strictly current operation and repairs to be kept currently paid within 30 days of date incurred," the mortgagee can declare a default. If this clause is not express authority to "run the vessel in debt," it is at least an ambiguity which should be resolved against Appellee who chose the language and drafted the document. Appellants cannot be required to resolve at their peril the uncertainty which laymen would have as to the legal effect of this language.

Appellee has, by the use of this ambiguous language, waived the priority its mortgage could have had over liens for operations and repairs.

Finally, in balancing the relative positions of the supplier and the mortgagee, it is evident that a mortgagee, in this situation, could easily protect himself by a simple, unambiguous prohibiting clause in his mortgage. He did not do so, but by implication, allowed the supplier to infer that the mortgagor in possession was authorized to "run the vessel in debt," if only for thirty days. He is, therefore, in no position to complain that the supplier has a senior lien. The District Court, having held the mortgagee's liens to be prior to Appellants' liens, has misinterpreted the applicable statutory and case law.

ARGUMENT.

I.

There Is Slight, If Any, Presumption of the Correctness of the District Court's Decree.

Appellant recognizes the usual rule that an Appellant faces the burden of showing that the District Court's decree is erroneous. In the majority of appeals, the District Court's decree is based upon a conflict of testimony, which it has resolved by Findings of Fact. This Court has, on many occasions, stated that when all the witnesses have testified in open court, the presumption of correctness is very strong. This strength decreases in a curve, as there are fewer "live" witnesses, until the "question-of-law-only" case is reached, when the presumption has little, if any, vitality.

> *Ernest H. Meyer* (C. C. A. 9th), 84 F. 2d 496, 1936 A. M. C. 1179 (cert. den. 299 U. S. 600, 57 S. Ct. 193, 81 L. Ed. 442);
>
> *Johnson v. U. S.* (C. C. A. 9th, 1947), 160 F. 2d 789, 1947 A. M. C. 765 (rev. on other grounds, 333 U. S. 46, 68 S. Ct. 391, 92 L. Ed. 468).

Here we have solely a question of law. The execution and recording of the mortgages and the incurring of the maritime liens are all undisputed [Agreed Statement of Facts, A. 104; Offer to Stipulate, A. 66; Libelant's Acceptance (Partial) of Offer to Stipulate, A. 71]. The exhibits speak for themselves [Appellee's "preferred" mortgages, Libelant's Exhibits 7 and 8; Appellant Crofton's Preferred Mortgage, Crofton's Exhibit "A," A. 33-

48]. This Court, in determining the relative priority of Appellants' liens and Appellee's mortgage, has before it only these questions of law—What is the legal effect of these "preferred" mortgages? What is the status of Appellants' maritime liens?

II.

Strong Public Policy Favors Maritime Liens of Suppliers of Necessaries to Vessels.

The Laws of Oleron (Art. I, 30 Fed. Cas. p. 1171), Wisbuy (Art. VI, XIII, 30 Fed. Cas. p. 1190), Hanse Towns (Art. LX, 30 Fed. Cas. p. 1201), Marine Ordinances of Louis XIV (Title First, Sec. XIX, 30 Fed. Cas. p. 1204, Title Fifth, Secs. II, III, 30 Fed. Cas. p. 1210; 30 Fed. Cas. p. 1171 *et seq.*) found it proper to make provision for extension of credit to vessels in a foreign port. The maritime lien has developed in Admiralty through the intervening centuries. It is security for the supplier and repairman who may not care to trust the owner, but is willing to take his chance on the credit and security of the ship he supplies or repairs. In 1910, Congress passed "An Act Relating to Liens on Vessels for Repairs, Supplies and Other Necessaries" (c. 373, par. 1, 36 Stat. 604, June 23, 1910) by the terms of which, the furnisher of repairs, supplies or other necessaries, including the use of a dry dock or marine railway to a foreign or domestic vessel upon order of the owner or a person authorized by the owner, should have a maritime lien on the vessel without the necessity of proving that credit was given to the vessel. This act, in its present form, now appears in the Ship Mortgage Act, as subsections P, Q and R of C. 250, par. 30, 41 Stat. 1005, June 5, 1920 (46 U. S. C. A. Secs. 971, 972, 973). These sections appear verbatim in the Appendix.

Appellant Crofton's position is that of a supplier of goods, wares and services, who asserts a maritime lien therefor. The note and mortgage were given and taken as security for the lien [see Offer to Stipulate, par. 5, A. 67, and Acceptance (Partial) of Offer to Stipulate, par. 1, A. 71].

Under this agreement, in this case, and upon the principles set forth in *The Bergen* (C. C. A. 9th, 1933), 64 F. 2d 877, 1933 A. M. C. 877, the mortgage being given as security, the maritime lien was not merged by taking of additional security.

The Supreme Court, in the case of *The Stjerneborg* (*Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co. of Calif.*) (1940), 310 U. S. 268, 60 S. Ct. 937, 84 L. Ed. 1197, in affirming the Ninth Circuit Court's decision (106 F. 2d 896), said of the public policy behind the maritime lien (at p. 276):

> "The origin of the maritime lien is the need of the ship. *Piedmont & G. C. Coal Co. v. Seaboard Fisheries Co.,* 254 U. S. 1, 65 L. Ed. 97, 41 S. Ct. 1, *supra.* The lien is given for supplies which are necessary to keep the ship going. The materialman when furnishing such supplies on order of the charterer is charged with knowledge of the terms of the charter party when he can ascertain them, but when it appears that by these terms the charterer has direction and control of the vessel and that he is the one to obtain the essential supplies and that there is no prohibition of the creation of a maritime lien, the materialman is protected by the terms of the statute. He furnishes the supplies on the order of the person authorized to obtain them and he is entitled to rely on the credit of the one who gives the order."

III.

Strong Public Policy Likewise Protects Holders of Preferred Ship's Mortgages.

Prior to 1920, United States vessels could not be mortgaged satisfactorily, in that maritime liens incurred by the mortgagor-owners in possession became senior to the lien of the mortgagee. This situation was corrected by the Ship Mortgage Act (June 5, 1920, C. 250, par. 30, 41 Stat. 1000) which by its terms (subs. D) (46 U. S. C. A. Sec. 922, Historical Note) was limited to preferred ship's mortgages on vessels of the United States "over 200 tons gross and upwards." The act provided that upon endorsement on the vessel's papers, recording with the Collector of Customs at the port of documentation of the vessel, and compliance with certain other conditions, the mortgage was to be called a "preferred mortgage."

In 1935, by amendment, application of the Statute to vessels over 200 tons was deleted (June 27, 1935, c. 319, 49 Stat. 424, 46 U. S. C. A. Sec. 922). It is now available to "any vessel of the United States."

Prior to 1935, it was possible to obtain a preferred mortgage upon very few fishboats, *i. e.,* those whose tonnage exceeded 200 gross tons; therefore, mortgagees who lent money on vessels under 200 tons sought to protect themselves as best they could. They developed a form "Mortgage of Vessel," form No. 1348 of Treasury Department [see Libelant's Exhibits 7 and 8], by the terms of which an "acceleration clause" was included in these terms:

> "or if said first party shall suffer and permit the vessel to be run in debt in an amount exceeding in

the aggregate the sum of ..... Dollars, the second party is hereby authorized to take possession," etc.

The mortgagees recognized that the mortgagors in possession were able to create maritime liens senior to the mortgagees' rights, but by being alert they could put the mortgage in default if the amount exceeded the ceiling they set. On occasion, a time limitation was set within which the liens had to be paid. The thirty day provision used by the Appellee was not infrequent. The mortgagee could thus set an amount or a time limit which he was content to risk. It was not satisfactory, but it was the best he could do. He could not get a preferred mortgage, and he could not prevent the mortgagor from incurring liens. By the 1935 amendment, all vessels of the United States were made subject to mortgage. Form No. 1348 is now obsolete, but is sometimes used as a makeshift "preferred" mortgage.

We must not lose sight of the fact that the Ship Mortgage Act is in derogation of the Common Law. It makes a material change in the traditional status of the maritime lien, and of course, requires strict compliance by the mortgagee with the requirements of the act. This attitude is reflected in the case of *Morse Dry Dock and Repair Co. v. Northern Star* (1926), 271 U. S. 552, 46 S. Ct. 589, 70 L. Ed. 1082, in which a custom officer's failure to endorse the mortgage on the vessel's papers prevented the mortgage from being "preferred" to the subsequently attaching maritime liens. This is hard law, but entirely in keeping with the usual attitude of the Court to this type of statute and the requirement of strict compliance with its terms.

IV.

The Situation of a Mortgagor Is Much the Same as That of a Charterer, Conditional Vendee or Any Other Person in Possession of a Vessel as Ostensible Owner.

The mortgagee is in much the same position as an owner who charters his boat to a charterer. He gives possession, ostensible ownership and the power to deal with repairmen to the mortgagor. The charterer is a person named in subsection Q of Ch. 250, Section 30 (41 Stat. 1005, 46 U. S. C. A. Sec. 972), of the Ship Mortgage Act, being

> "The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is entrusted,"

and is presumed to have authority from the owner to procure repairs of supplies.

> *The Stjerneborg (Damskibsselskabet Dannebrog v. Signal Oil Co.)* (1940), 310 U. S. 268, 60 S. Ct. 937, 84 L. Ed. 1197.

When we compare the position of the mortgagor in possession of a vessel with that of a charterer, we find that he too is a "person to whom the management of the vessel at the port of supply is entrusted." He has been allowed by the mortgagee to occupy a position in which the supplier would naturally regard him as authorized to pledge the credit of the vessel. He, too, is an ostensible owner who, just as the charterer, must be affirmatively and specifically prohibited from incurring liens or he has apparent authority to do so.

V.

The Maritime Lien Prevails in Charter Party Cases Unless the Person in Possession Is Specifically Prohibited From Incurring Liens.

Chartering owners have placed in most charter parties, a specific prohibition of the power of the charterer to create liens and subsection R of ch. 230, Section 30, 41 Stat. 1005, 46 U. S. C. A. Section 973, has placed upon the supplier the burden of ascertaining the authority of the person ordering the repairs, supplies or other necessaries. Thus, by the simple device of specifically prohibiting the lien in the instrument, the rights of the conflicting interests can definitely be determined.

Charter party cases have uniformly been decided by this Court on the basis of this rule of thumb: If the person in possession is unambiguously prohibited from creating a lien, the supplier cannot look to the credit of the vessel, and acquire rights superior to those of the chartering owner.

The South Coast (C. C. A. 9th, 1917), 247 Fed. 84 (affirmed 251 U. S. 519);

The Portland (C. C. A. 9th, 1921), 273 Fed. 401;

The Golden Gate (C. C. A. 9th, 1931), 52 F. 2d 397 (cert. den. 284 U. S. 682, 52 S. Ct. 199, 76 L. Ed. 576);

The Luddco 41 (C. C. A. 9th, 1933), 66 F. 2d 997, 1933 A. M. C. 1446.

The Supreme Court has likewise used the same rule of thumb when it affirmed *The South Coast* (1919), 251

U. S. 519, 40 S. Ct. 233, 64 L. Ed. 386, and decided the case of *United States v. Carver* (1923), 260 U. S. 482, 43 S. Ct. 181, 67 L. Ed. 361.

In the *South Coast* case, the charterer was held to have been implicitly authorized to create liens by an indemnity agreement and an acceleration clause, which provided for termination of the charter party if the charterer failed to discharge the ship's debts in thirty days. (Please note the similarity in the *South Coast* case to the acceleration clause incorporated by Appellee!)

In the *Carver* case, the charter party expressly prohibited liens, and the materialmen's liens were invalid against the owner.

In the *Stjerneborg* case (1940), 310 U. S. 268, 60 S. Ct. 937, 84 L. Ed. 1197 (affirming the Ninth Circuit's decision, 106 F. 2d 896), the Court, in discussing the point, said at pages 274, 275:

> "When the charter party was examined to see if it prohibited liens it was found that it did not do so; it recognized the possibility of liens. It provided that the owner might retake the vessel in case of the failure of the charterer to discharge within thirty days any debt which was a lien upon it and
>
> *(275)
>
> also for a surrender of the *vessel free of liens upon the charterer's failure to make certain payments.
>
> We think that the fair import of our decision in The South Coast is that when the charterer has the direction and control of the vessel and it is his busi-

ness to provide necessary supplies, and the charter party does not prohibit the creation of a maritime lien therefor, the materialman is entitled to furnish the supplies upon the credit of the vessel as well as upon that of the charterer and the lien is not defeated by the fact that the charterer has promised the owner to pay.

When, however, the charter party, with knowledge of which the materialman is charged, prohibits the creation of a lien for supplies ordered by the charterer or the charterer's representative, no lien will attach. This was decided in United States v. Carver, 260 U. S. 482, 67 L. Ed. 361, 43 S. Ct. 181. That was a case of vessels owned by the United States. The charterer, whose representative had ordered the supplies, had agreed that it would 'not suffer nor permit any lien' which might have priority over the title and interest of the owner."

"The court found a difference between the language of the charter party in the Carver Case and that used in The

*(276)

South *Coast. In the Carver case 'the primary undertaking' was that 'a lien shall not be imposed.' *The lien was denied, not because the charterer was bound to provide and pay for supplies but because the charter party prohibited the lien.* To the same effect is the decision in the case of the St. Johns. Colonial Beach Co. v. Quemahoning Coal Co., 260 U. S. 707, 67 L. Ed. 474, 43 S. Ct. 246." (Emphasis added.)

VI.

The "Charter Party Rule" Is Followed When the Lien Holder Has Dealt With Other Persons Who Are in Possession as Ostensible Owners.

The Supreme Court and the Court of Appeals for the Ninth Circuit have become firmly committed to the perfectly sound principle that the lien holder prevails unless the person in possession is specifically prohibited from imposing any lien by the terms of the document by virtue of which he is in possession. The identical reasoning is applicable to other situations in which the person in possession seeks to operate on the vessel's credit. Thus, the vendee under a conditional sales contract is in possession as ostensible owner and unless specifically prohibited, can incur liens senior to the interest of the vendor.

In the case of *Munson Inland Water Lines v. Seidl* (C. C. A. 7th, 1934), 71 F. 2d 791 (cert. den. 293 U. S. 606, 55 S. Ct. 123, 79 L. Ed. 697), the conditional sales contract did not expressly prohibit the vendee in possession from incurring liens, but did contain an undertaking that the vendee keep the vessel free from liens while the title was in vendor. The Court, on the authority of *The South Coast* (1919), 251 U. S. 519, 40 S. Ct. 233, 64 L. Ed. 474, and *United States v. Carver* (1923), 260 U. S. 482, 43 S. Ct. 181, 67 L. Ed. 361, concluded that an express prohibition was necessary, and that authority by implication was sufficient to allow imposition of liens by the person in possession.

In the case of *The Luddco 41* (C. C. A. 9th, 1933), 66 F. 2d 997, the vessel was in possession of a sales corporation, upon a consignment contract, by which the sales corporation was to use it for demonstration purposes, and defray costs of upkeep. The Ninth Circuit cases of *The*

South Coast (C. C. A. 9th, 1917), 247 Fed. 84 (Affirmed 251 U. S. 519), *The Portland* (C. C. A. 9th, 1921), 213 Fed. 401, and *The Golden Gate* (C. C. A. 9th, 1931), 52 F. 2d 397 (cert. den. 284 U. S. 682, 52 S. Ct. 199, 76 L. Ed. 576, were ample precedent for this Court to hold that where the person in possession has authority to create liens, reasonably implied from the contract, the liens he incurs are paramount. This case was questioned by the Eastern District Court of New York in the case of *The Pajala* (E. D. N. Y., 1934), 7 Fed. Supp. 618, but the *Pajala* was expressly overruled by the Supreme Court's reaction to the identical fact situation in the *Stjerneborg*. (See footnote 6 in the *Stjerneborg* case, 310 U. S. 277, 278.)

VII.

The Same Principles by Which Charter Party and Similar Cases Are Decided Governs Contests Between Maritime Lien Holders and Mortgagees.

What of the situation when the contest is between the person who supplies goods, repairs and necessaries at the request of the mortgagor in possession, and the mortgagee who holds a valid preferred mortgage, duly recorded and endorsed on the ship's documents? This is the case before the Court.

Robinson on Admiralty, Section 64, page 451, states that this conflict is resolved on precisely the same basis governing the charter party cases:

> "64. Disputes concerning the authority of a mortgagor who is left in possession of the mortgaged vessel further to pledge the ship's credit are similar to those concerning the authority of a charterer to do the same thing.

"If the mortgagor remains in possession of the vessel or vessels and operates them, as he so frequently does, dispute is bound to arise in much the same manner that it does between the owner and the charterer with reference to liens occurring in the normal use of the vessel. In *The Morse Dry Dock and Repair Co. v. The Northern Star* case (1926), 271 U. S. 552, 46 S. Ct. 589, 70 L. Ed. 1082, noted 1927 Boston U. Law Review 46, one of the covenants of the mortgage stipulated that the mortgagor should not suffer or permit to be continued any lien that might have priority over the mortgage and in any case within fifteen days after the same became due he was to satisfy the lien. The Court felt that this did not preclude the arising of a lien. At page 554, of 271 U. S., at page 589 of 46 S. Ct.: 'The most that such a contract can do is postpone the claim of a party chargeable with notice of it to that of the mortgage.' *If, of course, the person in charge of the vessel has no authority to pile up liens upon it,* and the party claiming the lien knows of this or can be charged with notice the problem of the priority does not arise at all. The question is whether any lien arises at all and *the problem in general is the same as that already brought out in Section 53 in respect to charterer and owner.*" (Emphasis added.)

We might note that in Section 53, pages 390 *et seq.,* to which *Robinson* refers, he has analyzed *The Golden Gate* (C. C. A. 9th, 1931), 52 F. 2d 387 (cert. den. 284 U. S. 682, 52 S. Ct. 199, 76 L. Ed. 576; and *The South Coast* (1919), 251 U. S. 519, 40 S. Ct. 233, 64 L. Ed. 386, and has also forecast the reasoning of *The Stjerneborg* (1940), 310 U. S. 268, 60 S. Ct. 937, 84 L. Ed. 1197 (affirming (C. C. A. 9th, 1939), 106 F. 2d 896).

Mortgage cases involving this contest are met somewhat less frequently. The foresight of draftsmen of preferred mortgages has prompted inclusion of express lien prohibitions. In the case of *The Henry W. Breger* (D. C. Md. 1927), 17 F. 2d 423, the Court had before it, a number of conflicting claims, including that of the Wittenberg Coal Co. for supplies (discussed at page 432). By the preferred ship mortgage, the mortgagor was specifically denied the authority to create "any liens whatsoever other than for crew's wages, *supplies* or salvage" (emphasis added). The Court said at page 432:

> "Obviously this section clothed the mortgagor or master of the vessel with power to create an indebtedness for supplies, and to subject the vessel to a lien therefor. The master was thereby enabled, wherever the vessel might be, to pledge her credit, not only to raise money to pay the crew, but also to buy the necessary supplies. Moreover, in order to make this authority practically effective, the lien was intended to have priority over that of the mortgage. The authority to purchase supplies is grouped in the same clause with the authority to impose liens upon the vessel for wages or salvage, which, under the Ship Mortgage Act, give rise to preferred maritime liens. It is therefore, a fair conclusion that the parties to the mortgage intended to put all three liens in the same category. Subsection S of Section 30 of the act (Comp. St. 8146¼ppp) provides that nothing in Section 30 of the act shall be construed to prevent the mortgagee from waiving his right to a lien, or, in the case of a preferred mortgage lien, to the preferred status of such a lien, at any time by agreement or otherwise.
>
> *The tacit permission given by the mortgagee to the imposition of a lien on the ship for supplies is pro*

tanto a waiver on the part of the mortgagee of the preferred status of the preferred mortgage lien. The claim of the Wittenberg Coal Company has priority over the mortgage." (Emphasis added.)

In the case of *The Bergen* (C. C. A. 9th, 1933), 64 F. 2d 877, 1933 A. M. C. 877, this Court held that when the preferred mortgage specifically prohibits liens, the lien for supplies arises, but will be postponed to the lien of the mortgage. It is apparent that but for the prohibiting clause, the supplier's lien would have been senior to the mortgage.

This Court followed the reasoning of the Supreme Court in the case of *Morse Dry Dock and Repair Co. v. Northern Star* (1926), 271 U. S. 552, 46 S. Ct. 589, 70 L. Ed. 1082, in which there was a specific prohibition of the authority of the mortgagor in possession to incur any lien that would have priority over the mortgage. The Supreme Court said at page 554:

"The owner of course had 'authority to bind the vessel' by virtue of his title without the aid of statute. The only importance of the statute was to get rid of the necessity for a special contract or for evidence that credit was given to the vessel. Subsection R, being Comp. St. Ann. Supp. 1923, 8146¼pp, it is true, after providing that certain officers shall be included among those presumed to have authority from the owner to create a lien for supplies goes on that 'nothing in this section shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel

> therefor.' But even if this language be construed as dealing with anything more than the authority of a third person to represent the owner so as to create a lien, still when supplies are ordered by the owner the statute does not attempt to forbid a lien simply because the owner has contracted with a mortgagee not to give any paramount security on the ship The most that such a contract can do is to postpone the claim of a party chargeable with notice of it to that of the mortgagee."

Thus, the mortgagor in possession has *power* to create liens. If his authority is specifically prohibited by the mortgage, the lien he creates is "postponed" to the lien of the mortgagee. Conversely, if the authority is not specifically prohibited, the lien he creates is not postponed to that of the mortgagee, but ranks it. The postponement is based only on the express prohibition.

In the case of *Eagle Star and British Dominions v. Tadlock* (S. D. Cal., 1938), 22 Fed. Supp. 545, Judge Yankwich had before him a case in which the contest was between a supplier of necessaries and a mortgagee who had evidently used the same Customs Form No. 1348 of the Treasury Department Appellee chose in this case. It provided that the mortgagee could declare a default in case the owner permitted the vessel "to be run in debt to an amount not exceeding in the aggregate of *No* Dollars." On the authority of 46 U. S. C. A. Secs. 971, 973, *The Yankee* (1916, 3 Cir.), 233 Fed. 919 (cert. den. 243 U. S. 649, 37 S. Ct. 476, 61 L. Ed. 946); *The Luddco 41* (1933, 9 Cir.), 66 F. 2d 997; *Morse Dry Dock Co. v. Northern Star* (1926), 271 U. S. 552, 46 S. Ct. 589, 70 L. Ed. 1082, he held that the supplier's lien was valid and superior to the mortgagee's rights under the mortgage.

The case was affirmed by this Court in *Walsh v. Tadlock* (C. C. A. 9th, 1939), 104 F. 2d 131, without much discussion of the point other than to say that "the seniority of the latter's maritime lien was recognized." Certiorari was denied by the Supreme Court, 308 U. S. 584, 60 S. Ct. 107, 84 L. Ed. 489.

VIII.

The Supplier Is Bound Only by What He Knew or Would Have Learned by Reasonable Diligence.

The Statute (Subsec. R of Ch. 250, Sec. 30, 41 Stat. 1005, June 5, 1920; 46 U. S. C. A., Sec. 973) provides that the person furnishing repairs, supplies and necessaries to a vessel on order of one of the persons designated in Subsection Q of the same section (46 U. S. C. A., Sec. 972) is bound by what he knew or by the exercise of reasonable diligence could have ascertained concerning the authority of the person ordering the repairs, supplies or other necessaries. If "because of the terms of a charter party, agreement for sale of the vessel, or for any other reason the person ordering the repairs, supplies or other necessaries was without authority to bind the vessel therefor" no lien is conferred. With this Appellants have no quarrel. (*The Admiral Goodrich (Shell Co. of Calif. v. Pacific S. S. Co.)* (C. C. A. 9th, 1923), 288 Fed. 362.)

Reasonable inquiry either did disclose, in the case of Appellant Crofton, or would have disclosed in the case of Appellant Larson, that there existed on file in The Office of the Collector of Customs at Tacoma, and endorsed upon the ship's papers, two documents calling themselves "preferred" mortgages [Libelant's Exhibits 7 and 8]. Appellants concede that they are bound by the terms of

those documents. They contain no express prohibition of the authority of the mortgagor in possession to incur liens. The provision with reference to liens by which Appellants are bound reads:

> "If said first parties shall suffer and permit the Vessel to be run into debt to an amount exceeding the aggregate of *a reasonable sum for strictly current operation and repairs to be kept currently paid within 30 days of the date incurred* . . . second party is hereby authorized to take possession of said goods." (Italicized portion is typewritten, balance is printed form.)

What does it mean? Should the ambiguous language be interpreted most strongly against the party selecting it?

The Supreme Court, in the case of *The Stjerneborg, (Dampskibsselskabet Dannebrog v. Signal Oil Co.)* (1940), 310 U. S. 268, 60 S. Ct. 937, 84 L. Ed. 1197, said that it is not necessary for the supplier to resolve the ambiguous provision of a charter party at his peril (at p. 280):

> "We are of the opinion that it would thwart the purpose of the statute to compel the materialman furnishing supplies to resolve the ambiguities which may be found in such charters as those involved here. The Statute was intended to afford the materialman a reasonably certain criterion. The owner has a simple and ready means of protection. *All that it is necessary for him to do, as the materialman in dealing with the charterer is charged with notice of the charter, is to provide therein that the creation of maritime liens is prohibited.* When the owner does

not do so, he should not be heard to complain when it appears that it is the charterer's business to obtain supplies to keep the vessel on her way and the charter has not prohibited reliance on the credit of the vessel." (Emphasis added.)

To the same effect is the case of *Virginia Shipbuilding Corp. v. U. S. Shipping Board Emergency Fleet Corp.* (E. D. Va., 1925), 11 F. 2d 156.

IX.

The Only Reasonable Interpretation of the Provision in the Mortgage Is That the Mortgagor in Possession Is Authorized to Incur Liens.

In the District Court, Appellee naively described the clause as "merely an acceleration clause." Appellants assume that now Appellee will concede that this ambiguous provision leaves something to be desired in the way of accuracy of expression. Appellants urge strongly that a careful analysis of the clause may clear up some of its uncertainty. Use of the expression "permit said vessel to be run in debt" is consistent only with the understanding by the parties that the vessel's credit is to be used for "strictly current operation and repairs." The very use of the printed form No. 1348, designed for vessels under 200 tons and developed when mortgagees could not protect themselves from liens incurred by mortgagors in possession, corroborates this interpretation. The form, it must be remembered, was used in situations when mortgagors could impose liens and mortgagees sought to protect themselves against too many of the liens they could not prevent. The very language used assumes that the mortgagor can and will "run the vessel in debt" *i. e.* incur maritime liens for operating expenses and repairs.

It merely seeks to set a thirty day limitation on the time within which these liens must be paid.

Appellees should not now be heard to complain that Appellants' liens, incurred while they allowed the "vessel to be run in debt," are senior to their mortgage security. The authority of the persons in charge of the boat, as conferred by the document by virtue of which they are in possession, not only impliedly authorizes them to incur liens, it expressly authorizes them to run the vessel "in debt" and incur a reasonable sum "for strictly current operation and repairs." True enough, to prevent the acceleration clause from operating, they would have had to pay off these liens within thirty days, but if the liens for goods, wares and repairs were incurred, they were to be valid liens, valid at least for thirty days. Under no precedent Appellants can locate, can these "30 day liens," once attaching, be divested. The key to the conflict, as stated by this Court in many cases, by the Supreme Court and by the District Courts and Courts of Appeals of others circuits, is simply this: If the document, by virtue of which a person has possession of a vessel, prohibits him from incurring any liens, the supplier does not obtain a senior lien; if that document authorizes liens, impliedly or expressly, the supplier's lien is paramount to the rights of the mortgagee, the chartering owner, the conditional vendor or any person who has placed another in charge of the vessel. Here, the person in possession is authorized, at least impliedly, to create liens by the ambiguity of the document. The suppliers' liens are therefore paramount.

X.

The Balance of the Equities Is in Favor of Appellants.

In situations in which the Courts have found two or more conflicting equities, or in which policy favors both sides of a contest over funds, Courts generally have been inclined to resolve the conflict by inquiring as to what each of the two deserving parties could have done to protect himself, and what parties similarly situated in the future can do to avoid similar loss.

In this case it is helpful to see what each of these parties could have done. The suppliers could follow the statute, examine the ship's documents and the Custom House records. They would then find Appellee's mortgages, which attempt to lift themselves by the boot strap designation, "preferred." They would, if careful, examine the terms and find that the mortgagors in possession are authorized to run the vessel "in debt" and incur reasonable sums for "strictly current operation and repairs." They would see that the mortgagor was obligated to pay the bills in thirty days. Undoubtedly, if they had any qualms about the obligations extending any substantial time over thirty days, they would not make the repairs or furnish the supplies. Furnishing credit to the vessel under these circumstances is understandably the act of a reasonably cautious supplier.

The mortgagee, on the other hand, does not want the credit of the vessel to be impaired or used. In order to restrict the mortgagor to operation of the vessel on his own credit, he has only to insert the specific prohibition in his mortgage: "Neither the mortgagor nor the master is authorized to suffer any lien to be placed upon the vessel during the term of this mortgage." He may reach

the same result by paying a dollar or two for a carefully drafted printed form of preferred ship's mortgage [see Art. V, Crofton's Exhibit "A," A. 38]. Any form worthy of the name contains the prohibiting clause. Balancing the opportunities in this case, Appellants had much less opportunity to avoid loss of the security of their liens than Appellee, who so simply could have protected its mortgage.

XI.

Appellee Has Waived Whatever Preferred Mortgage Lien It Might Have Had.

Appellants refer the Court to Subsection S of Chapter 250, Section 30, 41 Stat. 1005, June 5, 1920 (46 U. S. C. A., Sec. 974):

> "Nothing in this chapter shall be construed to prevent . . . the furnisher of repairs, supplies, towage, use of a dry dock or marine railway, or other necessaries, or the mortgagee, from waiving his right to a lien, or in the case of a preferred mortgage lien, to the preferred status of such lien, at any time by agreement or otherwise."

In the case of *The Henry W. Breger* (D. C. Md., 1927), 17 F. 2d 423, the Court talks in terms of waiver *pro tanto* by the "tacit permission given by the mortgagee to the imposition of a lien on the ship for supplies." In this case, there is likewise a "tacit permission" given by the mortgagee to the mortgagor in possession to run the vessel "in debt" and to incur "a reasonable sum for strictly current operation and repairs to be kept currently

paid within 30 days of date incurred." This is a waiver *pro tanto* of the preferred status of the mortgage. The mortgagee, under the statute, can waive the preferred status of the mortgage lien "at any time by agreement or otherwise." He has done so here by his choice of language in the mortgage. He has tacitly authorized "30 day" liens!

XII.
Conclusion.

The District Court's Decree Is Erroneous and Should Be Reversed or Modified.

Appellants have good and valid maritime liens for goods, wares and services furnished the vessel upon order of persons designated by the Statute as authorized to procure repairs, supplies and necessaries. They were persons entrusted with the vessel. No specific prohibition of their authority to create liens appears in Appellee's "preferred" mortgages. There is at least an ambiguity in the use of the language "permit the vessel to be run in debt to an amount exceeding the sum of a reasonable sum for strictly current operation and repairs to be kept currently paid within 30 days of the date incurred." If this language does not amount to an express authorization to run the vessel in debt to an amount *not* exceeding such reasonable sum, it is at least ambiguous language to be construed most strongly against the person selecting it. Appellants were therefore dealing with persons who had express or implied authority to order the supplies and have valid liens senior to the Appellee's mortgage liens.

Appellants' liens were adjudged junior to Appellee's mortgages. In this the District Court erred. This Court can correct the error by reversal of the Final Decree and remand for further proceedings as to disposition of the proceeds of sale. As an alternative, if this Court finds that Appellants' liens are senior to Appellee's mortgages, opportunity for a stipulated decree here could be afforded.

Respectfully submitted,

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By ARCH E. EKDALE,
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APPENDIX.

46 U. S. C. A., Section 922.

Section 922. Preferred mortgages.

(a) A valid mortgage which at the time it is made, includes the whole of any vessel of the United States (other than a towboat, barge, scow, lighter, car float, canal boat, or tank vessel, of less than two hundred gross tons), shall, in addition, have, in respect to such vessel and as of the date of the compliance with all the provisions of this subdivision, the preferred status given by the provisions of section 953 of this title, if—

(1) The mortgage is endorsed upon the vessel's documents in accordance with the provisions of this section;

(2) The mortgage is recorded as provided in section 921 of this title, together with the time and date when the mortgage is so endorsed;

(3) An affidavit is filed with the record of such mortgage to the effect that the mortgage is made in good faith and without any design to hinder, delay, or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel;

(4) The mortgage does not stipulate that the mortgagee waives the preferred status thereof; and

(5) The mortgagee is a citizen of the United States and for the purposes of this section the Reconstruction Finance Corporation shall, in addition to those designated in sections 888 and 802 of this title, be deemed a citizen of the United States.

(b) Any mortgage which complies in respect to any vessel with the conditions enumerated in this section is

hereafter in this chapter called a "preferred mortgage" as to such vessel.

(c) There shall be indorsed upon the documents of a vessel covered by a preferred mortgage—

(1) The names of the mortgagor and mortgagee;

(2) The time and date the indorsement is made;

(3) The amount and date of maturity of the mortgage; and

(4) Any amount required to be indorsed by the provisions of subdivision (e) or (f) of this section.

(d) Such indorsement shall be made (1) by the collector of customs of the port of documentation of the mortgaged vessel, or (2) by the collector of customs of any port in which the vessel is found, if such collector is directed to make the indorsement by the collector of customs of the port of documentation; and no clearance shall be issued to the vessel until such indorsement is made. The collector of customs of the port of documentation shall give such direction by wire or letter at the request of the mortgagee and upon the tender of the cost of communication of such direction. Whenever any new document is issued for a vessel, such indorsement shall be transferred to and indorsed upon the new document by the collector of customs.

(e) A mortgage which includes property other than a vessel shall not be held a preferred mortgage unless the mortgage provides for the separate discharge of such property by the payment of a specified portion of the mortgage indebtedness. If a preferred mortgage so provides for the separate discharge, the amount of the por-

tion of such payment shall be indorsed upon the documents of the vessel.

(f) If a preferred mortgage includes more than one vessel and provides for the separate discharge of each vessel by the payment of a portion of the mortgage indebtedness, the amount of such portion of such payment shall be indorsed upon the documents of the vessel. In case such mortgage does not provide for the separate discharge of a vessel and the vessel is to be sold upon the order of a district court of the United States in a suit *in rem* in admiralty, the court shall determine the portion of the mortgage indebtedness increased by 20 per centum (1) which, in the opinion of the court, the approximate value the vessel bears to the approximate value of all the vessels covered by the mortgage, and (2) upon the payment of which the vessel shall be discharged from the mortgage. June 5, 1920, c. 250, Sec. 30, subsec. D, 41 Stat. 1000; June 27, 1935, c. 319, 49 Stat. 424.

46 U. S. C. A. Section 953.

Section 953. Preferred maritime lien; priorities; other liens.

(a) When used hereinafter in this chapter, the term "preferred maritime lien" means (1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this chapter; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit *in rem* in admiralty for the enforcement of a preferred mortgage lien thereon, all pre-existing claims in the vessel, including any possessory common-law lien of which a lienor is deprived under the provisions of section 952 of this title, shall be held terminated and shall thereafter attach, in like amount and in accordance with their respective priorities to the proceeds of sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court. June 5, 1920, c. 250, Sec. 30, subsec. M, 41 Stat. 1004.

46 U. S. C. A. Section 971:

Section 971. Persons entitled to lien.

Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel. June 5, 1920, c. 250, Sec. 30, subsec. P, 41 Stat. 1005.

46 U. S. C. A. Section 972:

Section 972. Persons authorized to procure repairs, supplies, and necessaries.

The following persons shall be presumed to have authority from the owner to procure repairs, supplies, tow-

age, use of dry dock or marine railway, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel. June 5, 1920, c. 250, Sec. 30, subsec. Q, 41 Stat. 1005.

46 U. S. C. A. Section 973:

Section 973. Notice to persons furnishing repairs, supplies, and necessaries.

The officers and agents of a vessel specified in Section 972 of this title shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel; but nothing in this chapter shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor. June 5, 1920, c. 250, Sec. 30, subsec. R, 41 Stat. 1005.

46 U. S. C. A. Section 974:

Section 974. Waiver of right to lien.

Nothing in this chapter shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, or the mortgagee, from waiving his right to a lien, or in the case of a

preferred mortgage lien, to the preferred status of such lien, at any time by agreement or otherwise; and this chapter shall not be construed to affect the rules of law existing on June 5, 1920, in regard to (1) the right to proceed against the vessel for advances, (2) laches in the enforcement of liens upon vessels, (3) the right to proceed in personam, (4) the rank of preferred maritime liens among themselves, or (5) priorities between maritime liens and mortgages, other than preferred mortgages, upon vessels of the United States. June 5, 1920, c. 250, Sec. 30, subsec. S, 41 Stat. 1005.

No. 13225

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CROFTON DIESEL ENGINE COMPANY, INC., a corporation, and AL LARSON BOAT SHOP, a corporation,

Appellants,

vs.

PUGET SOUND NATIONAL BANK OF TACOMA, a corporation, and ETS-HOKIN & GALVAN,

Appellees.

REPLY BRIEF OF APPELLEE PUGET SOUND NATIONAL BANK OF TACOMA.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED.

Cases

Statutes

Textbooks

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Appellees.

REPLY BRIEF OF APPELLEE PUGET SOUND NATIONAL BANK OF TACOMA.

Counter-Statement of Facts.

On August 18, 1948, the owners of the respondent vessel, the "FLYING CLOUD," executed a mortgage [Libelant's Exhibit 7] on the vessel in favor of appellee Puget Sound National Bank of Tacoma, to secure their note of $25,000.00, which sum was loaned by the bank for the purchase of the vessel. On the same day, a second mortgage [Libelant's Exhibit 8] was executed on the vessel by the owners to the Kazulin-Cole Shipbuilding Corporation for $10,000.00, also as part of the purchase price. The bank's mortgage was first recorded and endorsed on

the vessel's document by the Collector of Customs at Tacoma, and the mortgage of the shipyard was later recorded and endorsed, but both on August 19, 1948. The shipyard's mortgage was subsequently assigned [Libelant's Exhibit 9] to the appellee bank. Under the stipulation made and approved by this Court, the exhibits were not printed in the Apostles, but will be considered by this Court in their original form.

The form and contents of each mortgage are similar. Each mortgage contains the following covenants and conditions which follow the recital of the note:

> "But if default be made in such payments, or in any one of such payments, or if default be made in the prompt and faithful performance of any of the covenants herein contained, or if the said party of the second part shall at any time deem itself in danger of losing said debt, or any part thereof, by delaying collection thereof until the expiration of the time above limited for the payment thereof, or if said parties of the first part shall sell or attempt to sell said property, or any part thereof, or if the same shall be levied upon or taken by virtue of any attachment or execution against said first parties, or if said first parties shall remove, or attempt to remove, said vessel beyond the limits of the United States, *or if said first parties shall suffer and permit said vessel to be run in debt to an amount exceeding in the aggregate the sum of a reasonable sum for strictly current operation and repairs to be kept currently paid within 30 days of date incurred,* or if said first parties shall negligently or wilfully permit

said property to waste, or be damaged or destroyed, *said party of the second part is hereby authorized to take possession* of said goods, chattels, and personal property at any time, wherever found, either before or after the expiration of the time aforesaid, *and to sell* and convey the same, or so much thereof as may be necessary to satisfy the said debt, interest, and reasonable expenses . . .

And it is hereby provided, that it shall be lawful for said first parties, their executors and administrators, to retain possession of the property hereby mortgaged, and at their own expense to use and enjoy the same until said indebtedness shall become due, unless said second party *should at any earlier date declare this mortgage forfeited for nonperformance of any of the covenants herein contained,* or by virtue of any authority hereby conferred on said second party." (Italics added.)

The immediate and proper recording and endorsement of the two mortgages on the ship's document is conceded by appellants.

The vessel then sailed to San Pedro, California.

In October of 1949, a year later, the owners had some work done on the vessel at the yard of appellant Larson. There was no testimony or evidence that Larson did not know that the vessel was mortgaged to appellee when he did this work.

Then, in May of 1950, appellant Crofton did some engine work and gave some supplies. Crofton also well

knew of the appellee's mortgages. To secure his claim, Crofton also took a mortgage at the time he did the work, and this mortgage recites very plainly on its face that it is a "THIRD PREFERRED MORTGAGE." [Crofton's Exhibit "A."]

Later, on or about July 18, 1950, with *three* mortgages now on the vessel, appellant Larson did further work to the value of $2,120.03.

The owners being in default, the appellee, Puget Sound National Bank of Tacoma, filed suit to foreclose their mortgages; the vessel was libeled and sold, and the money paid into the Registry of the Court.

Counter-Statement of Question Involved.

Appellee submits that there is but one question here:

1. Was the District Court correct in holding that the appellee's first and second mortgages did not stipulate that the mortgagee waived the preferred status thereof?

Summary of Argument.

The District Court's decision that the appellee's mortgages did not stipulate to waive their preferred status was a decision of fact, as well as law, and thus there is a strong presumption in favor of the correctness of the District Court's decree.

The District Court decided that appellee's mortgages complied with the Ship Mortgage Act in all respects and particulars.

Appellee's first and second mortgages each state that it is given to secure a promissory note, which is set out, and there is a promise to pay the debt and to "fulfill and perform each and every one of the covenants and conditions herein contained." *Then eight conditions are set forth:* If there is a default in payment; if the mortgage covenants are not performed; if there is danger to mortgagee by delaying collection until expiration of time stated in note; if mortgagor shall sell or attempt to sell; if there is a levy or execution against the vessel; if there is a removal beyond limits of the United States; if the mortgagor runs the vessel in debt beyond a reasonable sum; or if the mortgagor negligently permits the vessel to be damaged or destroyed, then the mortgagee can take possession and sell the vessel to satisfy the mortgage. These provisions were correctly held by the District Court to be conditions of the mortgage, the happening of any one giving the mortgagee the right to accelerate the maturity of the mortgage and foreclose at once.

Both of the suppliers here gave credit knowing that the vessel was under a first and second mortgage to appellee. They were then put on notice as to their junior status. Crofton knew that he was third in line, and so designated his mortgage. Larson relied on the owners personally, he even gave credit after three mortgages were on the vessel. So, neither of the suppliers were deceived or misled as to the first priority of appellee's mortgages.

There is no ambiguity here. The appellants have shown by their own acts at the time they gave credit, that they

knew that they were working after first and second mortgages. Crofton stated that his mortgage (drawn by his present counsel) was a *third* mortgage, and is estopped to deny the validity of appellee's first and second mortgages.

Appellants' fundamental error lies in their argument that to be preferred, a mortgage must prohibit any and all liens under all circumstances. The Ship Mortgage Act sets forth the requirements a mortgage must meet to acquire a preferred status; and a prohibition of liens is not in the Act's requirements, nor has any court so held.

Apppellants are also in error in comparing the rules governing suppliers in charter party cases with the rules where a preferred mortgage is involved, in that:

(a) In charter cases, the one in possession *is presumed to have authority* to incur a lien for supplies;

(b) But, a preferred mortgage *has priority* for supplies, unless the mortgagee stipulates that he waives his preferred status.

That is to say, in charter cases, authority to incur a lien is presumed, unless the contrary is shown, but *priority of the mortgage* is given by statute (unless the mortgagee stipulates to waive the priority) with the supplier's lien coming off second best.

ARGUMENT.

I.

There Is a Strong Presumption of the Correctness of the District Court's Decree.

The District Court found as a fact that the appellee's mortgages did not stipulate that the mortgagee waived the preferred status thereof [A. pp. 77 and 78]. This finding was based on evidence such as the mortgages that were placed into the record, the libelant's interrogatories [A. pp. 59, 61], appellant's answers [A. pp. 63, 65], the oral testimony of William B. Crofton who testified for appellant Crofton. Appellants have failed to bring up the record of the oral testimony, so nothing therein could have been favorable to the position; and either what testimony there was given was unfavorable to appellants, or the failure to testify at all on certain points involved, gave rise to inferences unfavorable to appellants. This Court cannot speculate as to these matters, but must presume that the District Court's finding in that regard was correct. Because of this presumption it cannot be said that the District Court acted in utter disregard of the evidence. (*The Redwood and Sun D'E,* C. C. A. 9th, 73 F. 2d 922; *Donovan v. N. Y. Trap Rock Co.,* 271 Fed. 308; *The Bern,* 261 Fed. 995.)

In other words, we do not have a case here where testimony was entirely by deposition. Live witnesses were called by the appellants. Their testimony, or failure to testify, on the points at issue, was subject to the trial court's scrutiny and judgment. Appellants' counsel claim that there is an ambiguity in appellee's mortgages. Were they ambiguous to the appellants themselves? Did they testify that they believed that they were acquiring lien

superior to those of appellee's mortgages, at the time they did the work? No—and consequently appellants have not brought up their testimony. But the trial court had to determine whether this contention was a matter of lawyer's artifice, or actually an ambiguity to those in the business world. The demeanor of the appellants while testifying, the intelligence they exhibited while being examined, the questions their counsel asked and those upon which he avoided committing his clients—these were elements that the District Court trial judge had to weigh, and which this Court is not in a position to do.

Therefore, in this Court there is a strong presumption that the judgment of the District Court was correct, and if there is evidence to support the District Court's decision, it should be affirmed.

II.

Public Policy Does Not Favor Suppliers Over Preferred Mortgagees of Vessels.

The United States statutes have settled that suppliers of necessaries to vessels have a lien, so we don't have to go back to the Laws of Oleron, etc. Statutes of the United States have created the preferred ship mortgage (46 U. S. C. A. 911, *et seq.*) and these statutes subordinate the supplier's lien to that of the mortgage. (46 U. S. C. A. 935(b).) Public policy as to priorities is incorporated in those statutes, and is not a subject of argument or conjecture.

Appellant Crofton contends that his position is that of a supplier of goods, wares, and services, who asserts a maritime lien therefor. Appellee denies that to be his position in this case. Crofton filed an Intervening Libel

[A. p. 18] to foreclose its Third Preferred Mortgage; the execution of the note by the owners to Crofton, the giving of the Third Mortgage as security, the recording of the mortgage, and subsequent default, are all alleged in detail. The Findings of Fact and Conclusions of Law follow the Libel [A. pp. 79, 84]; as does the Decree [A. p. 90]. The libel contains no cause of action for foreclosure of a maritime lien by Crofton. Appellant Crofton, having tried his case on the theory that he was foreclosing a Third Preferred Mortgage, cannot switch theories on appeal.

The Offer to Stipulate and Acceptance of Offer to Stipulate [A. pp. 67, 71] merely show that the consideration for the note was work and supplies.

Therefore, Crofton's rights in the case and this appeal must depend on its status as a mortgagee. As a mortgagee, by accepting a clearly defined Third Preferred Ship's Mortgage, Crofton is estopped to contest the validity of the first and second mortgages. *The Nan B,* 78 Fed. Supp. 748, involved the foreclosure of a mortgage, alleged to be preferred. The intervener claimed a defect in the said mortgage, and that it had not been verified as required by statute. The Court had this to say of the intervener:

> "Intervener neither altered his position nor was prejudiced in any way by reason of the omission of the words referred to from libelant's mortgage. On the contrary, he acted on the assumption that the validity of the instrument as a preferred mortgage was unquestioned and, accordingly, *recited in his own mortgage that it was a second preferred mortgage* and subject to the lien of libelant's mortgage. It appears well settled that in these circumstances the

junior mortgagee is estopped from contesting the validity of the prior mortgage. *Galveston RR. v. Cowdrey,* 11 Wall. 459, 480, 482, 20 L. Ed. 199; *Sharp v. Hollister,* 65 Colo. 110, 174 P. 301; *Nichols v. Jackson County Bank,* 136 Or. 302, 298 P. 908; *McDonnell v. Burns,* 8 Cir., 83 F. 866; *Avery County Bank v. Smith,* 186 N. C. 635, 120 S. E. 215." (Italics added.)

But even if Crofton be considered the holder of a maritime lien in this case, that will not help him. He has certainly admitted that he gave goods and services to the vessel, well knowing of appellee's two preferred mortgages, and the preferred status of appellee's mortgages will still relegate Crofton to a junior place and only entitle him to be paid after appellee.

The citation by appellant of *The Stjerneborg* case is not in point, since that case involved a *charter* and not a ship's mortgage. Charter party cases are not analogous. Under the statutes of the United States, certain persons in possession under a charter have authority to incur maritime liens, unless such authority is clearly denied to them by the terms of the charter party (46 U. S. C. A. 973). But such a requirement, *i. e.,* denial of authority, is *not* made an element of a preferred ship's mortgage. The statute, 46 U. S. C. A. 922, requires:

(1) The mortgage to be endorsed on the vessel's document;

(2) Duly recorded with the Collector of Customs;

(3) With an affidavit of good faith;

(4) That the "mortgage does not stipulate that the mortgagee waives the preferred status thereof";

(5) The mortgagee to be a citizen of the United States.

The statute then states that any mortgage which complies with the above conditions is a "preferred mortgage"; and 46 U. S. C. A. 953 provides that the preferred mortgage shall have priority over all claims against the vessel, except preferred maritime liens, which are defined in the preceding subsections as a lien arising *prior* to the recording and endorsement of the preferred mortgage, or a lien for damages arising out of tort, wages of stevedore or crew, general average and salvage.

At no place does the Ship Mortgage Act state that a supplier will be prior to a preferred mortgagee, unless the mortgage prohibits creation of any maritime liens by the mortgagor. Appellants can cite no case in support of their argument.

Therefore, it cannot be reasoned that because a supply lien will attach to a vessel ahead of the owner-charterer's rights, unless there is a prohibition of the creation of a maritime lien, a supply lien will also rank ahead of a preferred mortgage, unless the mortgage also contains a prohibition of the creation of a maritime lien by one in possession. The rank of a preferred mortgage is fixed by statute, and the statute says that the preferred mortgage which meets the above five conditions shall have priority over all claims (appellants do not claim that they have a preferred maritime lien as defined by statute (46 U. S. C. A. 953(a)).

III.

The Policy of the Ship Mortgage Act Will Be Promoted by Constructions of the Mortgage so as to Uphold Its Validity Whenever Possible.

While the courts have construed the Ship Mortgage Act of 1920 very strictly when the recording features of the Act were not complied with by the mortgagee, the courts have held that once a mortgage was properly recorded and endorsed on the ship's document, and thus notice given to all, that the purpose and policy of the Act would be promoted by constructions of the mortgage so as to uphold its validity whenever possible.

Thus, the *Morse Dry Dock* case (*Morse Dry Dock & Repair Co. v. The Northern Star,* 46 S. Ct. 589, 271 U. S. 552), relied on by appellants, involved a mortgage that was signed by the mortgagors on one date and recorded. Then some work was done on the vessel by the shipyard. After the work had been done, the mortgage was then endorsed on the ship's document. The shipyard had no knowledge of the execution of the mortgage. Justice Holmes held that the mortgage should have been endorsed to become preferred. Therefore, not being preferred, it was merely a chattel mortgage, over which maritime liens had priority. We have no argument with the case. Obviously, endorsement on a ship's document is essential to give notice to the shipyards, suppliers, etc.

But when the mortgage has been correctly recorded and endorsed, the courts have resolved any doubts in favor of validity. The cases of *Collier Advertising Service v. Hudson Day Line,* 14 Fed. Supp. 335, aff. 93 F. 2d 457, and *The Nan B,* 78 Fed. Supp. 748, are precisely in point.

In *The Nan B* case, the Court said:

"Aside from these considerations and in the absence of authority on the precise point, it is worthy of note that in The Nanking, D. C. Cal. 1923, 292 F. 642, it was held that the provision, prescribed by the same section, that certain facts with reference to the preferred mortgage shall be endorsed upon the mortgaged vessel's document, is merely directory and that a failure to make such an endorsement does not result in a loss of the preferred status accorded such mortgage. Decisions construing similar requirements of statute governing the verification of chattel mortgages are in harmony with the foregoing view and should, upon principles of analogy, be accorded considerable weight. They hold that in the absence of fraud, instruments so common in commercial transactions should be sustained whenever there is an honest and substantial compliance with the statutes *and that criticism directed to matters of artifice rather than to those of substance ought not to prevail. Cf.* American Soda Fountain Company v. Stolzenbach, 75 N. J. L. 721, 68 A. 1078, 16 L. R. A., N. S., 703, 127 Am. St. Rep. 822; Deseret National Bank v. Kidman, *supra;* Puget Sound Pulp and Timber Company v. Clear Lake Cedar Corp., 15 Wash. 2d 707, 132 P. 2d 363, 143 A. L. R. 1249; Wells v. Rutkowski, 6 Cir., Ohio, 69 F. 2d 143.

Finally, the intervenor urges a strict construction because the statute effected a radical departure from traditional admiralty practice in conferring jurisdiction upon admiralty courts to foreclose mortgages

on vessels. The same argument was made, without avail, in urging a like construction of statutes allowing the mortgagor to retain possession of personal property upon executing an affidavit of good faith, upon the ground that such statutes were in derogation of the common law. It is the opinion of the court that the statute here involved should be strictly construed so far as the protection of creditors and lienors from fraud and like acts is concerned, but liberally construed to effectuate the object of the statute to make investments in shipping and ship mortgages more attractive and secure. *The Favorite,* 2 Cir., 120 F. 2d 899.

Accordingly, the court holds that there was a substantial compliance with the statute and that the lien of libelant's mortgage is superior to that of intervenor's." (Italics added.)

In the *Collier* case, Judge Patterson said:

"The object of Congress in enacting the Ship Mortgage Act was to encourage the investment of capital in American shipping, to improve the security of investments by way of mortgage on vessels, and to promote public confidence in such investment. Detroit Trust Co. v. The Thomas Barlum, 293 U. S. 21, 55 S. Ct. 31, 79 L. Ed. 176. That policy would be defeated if an attack based on grounds so inconsequential were to prevail."

Thus, the rule of the *Morse* case should not be applied here, but rather that of the *Collier* and *The Nan B* cases.

IV.

The Ship Mortgage Act Places the Mortgagor and the Suppliers-Repairmen in Different Categories With Different Rights Than the Maritime Lien Act Places the Charterer and the Supplier-Repairmen.

The holder of a preferred ship's mortgage is *not* in the same position as to suppliers-repairmen as an owner who charters his boat. Appellants' argument that they are is false for the very simple reason that the statutes of the United States gives them different rights. Under appellee's Point II, we quoted the statutes and pointed out the fallacy of appellants' argument.

As a matter of practice, a supplier who does business with a vessel need only to ask to see the vessel's document. It must be on board at all times. If the vessel is not under management of the named owners, he can call for the charter. By reading the charter, he can ascertain if there is a prohibition of the creation of maritime liens; if not, he knows he has a lien on the vessel for his supplies, otherwise he looks to the operator alone.

By the same simple practice, the supplier can look at the vessel's document and ascertain if there is a preferred mortgage endorsed thereon. If there is, the amount and due date are shown. He can then call for a certified copy of the mortgage and check to see if the mortgagee has stipulated to waive his preferred status. If there is no stipulation waiving preference, the supplier knows that his lien comes after the mortgage.

V.

The Charter Party Cases Are Not Analogous to the Preferred Mortgage Cases in Considering Maritime Liens.

Appellants seem to base their whole appeal on an attempt to use the rules and reasoning of the charter party cases to this case involving the construction of a preferred ship's mortgage. Appellee, in the preceding paragraph has shown the fallacy of this line of argument.

Language that would indicate to a repairman or supplier that the person ordering the repairs, supplies, or other necessaries, was without authority to bind the vessel therefor, is one thing. Language that would indicate to such a man that the holder of a mortgage on a vessel has stipulated to waive the preferred status of his mortgage is another.

In this case, involving a mortgage, appellants must show that the District Court was clearly in error in deciding that the mortgagee had not stipulated to waive the preferred status of the mortgage. An analysis of charter parties is of no help. For instance, in *The South Coast,* 247 Fed. 84 (aff. 251 U. S. 519), the court held that there was no withdrawal by the owner of the charterer's power to bind the vessel.

In this case, considering all the language of the appellee's mortgages, considering the questioned clause together with the other clauses of the same paragraph of the mortgage, which were also clearly conditions of the mortgage, the District Court had ample and sufficient grounds for its decision in appellee's favor.

VI.

The "Charter Party Rule" Does Not Apply to Preferred Ship's Mortgages.

Under Point VI, appellants restate their previous argument, and cite cases to the effect that the rule in charter party cases, that there must be a withdrawal of power from the charterer to incur a maritime lien, also applies to cases of conditional sales or consignment of a vessel. With this we have no argument.

But we do wish to again point out that the statute governing preferred ship's mortgages is not the same statute as that governing rights under charter parties, conditional sales agreements, consignments, or anything else.

Preferred ship's mortgages are *sui generis,* and to determine rights thereunder, we must look to the statutes creating them, and there alone.

VII.

It Is Not True That the Same Principles by Which Charter Party and Similiar Cases Are Decided Govern Contests Between Maritime Lien Holders and Mortgagors.

In the previous paragraphs, appellee has answered the argument of appellants by pointing out that the principles which govern charter party cases are stated in Sections 971 *et seq.* of 46 United States Code; whereas the principles of governing preferred ship's mortgages are stated in Sections 911-954 of 46 United States Code.

Section 922 of 46 United States Code is the statute which creates the preferred mortgage, and Section 953

states its priority over all subsequent supply or repair liens.

Appellants cite page 451 of Robinson, *Admiralty*. The quote from the text dealt with the *Morse Dry Dock* case, which did *not* involve a valid preferred mortgage. We will just turn the page, and quote from the text, page 452, *to reach the point at issue in this case:*

> *"The order of preference as between liens and mortgage.*
>
> If, however, valid maritime liens arise *and there is also a valid mortgage under the 1920 Act, the latter statute itself provides for the priorities between the liens and the mortgage.* '. . . the term "preferred maritime lien" means (1) a lien arising prior in time to the recording and endorsement . . . etc., or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.'
>
> *The effect of this recital is to exclude from preference contract liens, chiefly of the supply and necessary class for which the Federal Lien Acts, already discussed in section 50 et seq., make so much provision.* . . . The contract claims excluded are of such a character that the contractor may ascertain before he acts how the situation stands." (Italics added.)

The citation of the case of *The Henry R. Bregor* (D. C. Md., 1927), 17 F. 2d 423, does not help much here, because the factual situation was different. In that case the District Court found as a fact, from the particular language of the mortgage, considered in context with other language, in the mortgage, that the mortgage had stipu-

lated to waive his priority over supply liens. But in this case, the finding of the District Court that appellee's mortgages did not stipulate away their preferred status, was one based on a reasonable view of all the evidence. What a District Court in Maryland found as a fact when considering one mortgage is of no value when considering whether the District Court here, with a different set of facts, was correct in its decision.

Furthermore, the *Bregor* case did not involve a *condition subsequent* in the mortgage; in the case at bar, a condition subsequent is stated very clearly: If the mortgagors suffer and permit said vessel to be run in debt, the mortgagees are authorized to take possession at once and sell to satisfy the mortgages. Here is a warning to suppliers: Be paid in cash or look to the personal credit of the owners; if you or anyone else place claims against the vessel, which are not paid in 30 days, we will call the mortgages at once regardless of whether the principal note is due; we demand that the mortgagors pay their bills promptly. Surely, that is the antithesis of a stipulation that the mortgagee waives his priority and consents that supply men and repair men shall come ahead of him with their liens.

Appellants' citation of the case of *Eagle Star & British Dominions v. Tadlock* (S. D. Cal., 1938), 22 Fed. Supp. 545, is absolutely not in point. The opinion states in the beginning that the mortgage was *not a preferred mortgage*. The case can be no authority whatsoever when considering the priority of a preferred ship's mortgage. The case holds that the supplier was prior to the mortgage holder, who, not having a preferred mortgage, had only a chattel mortgage, which was outranked by a maritime lien.

VIII.

The District Court Was Correct in Holding That There Was No Ambiguity in Appellee's Mortgages.

By finding as a fact that appellee's mortgages did not waive the preferred status thereof, the District Court impliedly found that there was no ambiguity in appellee's mortgages. The District Court impliedly found as a fact that the provision in the mortgage that "if said first parties shall suffer and permit the vessel to be run into debt to an amount exceeding the aggregate of a reasonable sum for strictly current operation and repairs to be kept currently paid within 30 days of the date incurred . . . second party is hereby authorized to take possession . . . and sell," was a condition of the mortgage; that a condition subsequent was stated, along with seven other conditions in the mortgage; the happening of any one could accelerate the due date and enable the mortgagee to call for immediate payment of its claim. The mortgage must be construed with all the language and provisions being considered.

As to why the mortgagee inserted the clause, a mortgage can, and usually does, contain many conditions and covenants which the mortgagor agrees to fulfill, in addition to paying the debt involved. The purpose of such covenants and conditions is to protect the security of the mortgagee. Where certain property is used in a business by the mortgagor, the mortgagee may look to the business of the mortgagor as well as to the thing mortgaged. If the mortgagor is a commercial fisherman, the mortgagee knows that the usual payment of the mortgage comes from the sale of fish caught. If the mortgagor is a

poor fisherman, or is unable to operate the vessel properly, the first indication thereof will be unpaid supply and repair bills for current operations; under such conditions, the mortgagee may want to be able to call for immediate payment of its debt, and have the power to proceed at once under the mortgage to obtain payment.

As *The Bergen,* 64 F. 2d 877 (C. C. A. 9th), indicates, the mortgagee cannot even by covenant prevent the creation of liens for repairs, supplies and other services. However, where the mortgage contains a condition that such a lien must be paid promptly, the mortgagee has imposed a severe limitation or restriction of the mortgagor. Certainly the inability of the mortgagor to let liens pile up against the vessel, or to be more than 30 days delinquent, is the very opposite of a stipulation that the mortgagee waives its preferred status and consequent priority over such liens.

As to the meaning of the quoted clause, the view taken by the District Court cannot be said to be unreasonable or clearly unsupported by the facts. *The appellants themselves took the same view.* Crofton, in his mortgage prepared by his present counsel, who are now arguing ambiguity, took a "Third Preferred Mortgage" for his work. Certainly it cannot be seriously argued by Crofton now that there was an ambiguity in the appellee's mortgages and that he was misled into thinking that he had a supply lien that ranked prior to the appellee's mortgages. Appellant Larson did the major part of his work after there were three mortgages on the vessel, so he was looking to the owners' credit alone.

Then why this appeal? It seems to us that the whole appeal is based on the belief of appellants' counsel, unsupported by any decisions, that because appellee's mortgages contain no express prohibition of the authority of the mortgagor in possession to incur any liens (App. Br. p. 27), the mortgages are not preferred and liens incurred by the mortgagor in possession are superior to that of the mortgage. In the preceding paragraphs we have shown the fallacy in this argument. A preferred ship's mortgage, being *sui generis* is prior to supply and repair liens because our statutes so provide (Robinson, *Admiralty,* p. 452; *The Bergen,* 64 F. 2d 877). The requirement that mortgages must contain a prohibition against the mortgagor in possession incurring any liens, is a figment of imagination of appellants' counsel.

IX.

The District Court's Decision That the Mortgage Did Not Stipulate to Waive the Preferred Status Thereof Was Reasonable and Supported by the Evidence.

In construing the clause of appellee's mortgages, now in question, the District Court's decision was reasonable and supported by the evidence, in that the clause now questioned must, as is the case when construing any written instrument, be considered in context with the document as a whole. When so examined, it is seen that there are eight conditions clearly set forth in the same

paragraph of the mortgages. The word "if" is used eight times to introduce the *eight conditions* of the mortgage, which are:

(1) If there is default in payment;

(2) If there is not performance of mortgage covenants;

(3) If there is danger to mortgagee by delaying collection until expiration of time stated in note;

(4) If there is an attempt to sell by mortgagor;

(5) If there is a levy or execution on vessel;

(6) If there is a removal of vessel beyond limits;

(7) If the mortgagors run the vessel in debt beyond a reasonable sum;

(8) If the mortgagors negligently or wilfully permit the vessel to waste, be damaged, or be destroyed.

Upon the happening of any one of the above conditions, the mortgagee can call the mortgage due, take possession, and sell to satisfy the mortgage.

As far as the seventh condition is concerned, it places all persons on notice that even if the principal of the note, for which the mortgage is given as security, is not in default, if the mortgagors do not pay their bills promptly in 30 days and thus the enterprise which revolves around the fishing vessel piles up debts, then the mortgagee need not wait but may demand payment at once and have a better chance of getting paid while the mortgagors still have some funds or credit left.

Certainly, the meaning is clear that conditions subsequent are thus stated in the mortgage; and there is *not* stated an authorization permitting debts, nor is there a stipulation that the preferred status of the mortgage is waived as to such debts.

Appellants argue, pages 28 and 29 of brief, that appellee has "permitted said vessel to be run in debt" and that appellee has "allowed the vessel to be run in debt." These statements are misquotations of the mortgage clause, resulting from a lifting out of context of part of a clause.

The mortgage cannot permit or deny the vessel to be subject to liens—any vessel that is mortgaged can have liens placed on it, only they are junior to the mortgage. That is the precise point decided by this Court in *The Bergen,* 64 F. 2d 877. The clause in question here is a condition or limitation on the rights of the mortgagors, to-wit: That if the mortgagors suffer or permit such liens, maturity may be accelerated; *i. e.,* the mortgagors must keep their financial condition in such good shape that their current operating bills are paid within 30 days or else the maturity of the mortgage may be accelerated.

The *Bergen* case, 64 F. 2d 877, is relied on by appellee for the point that the existence of a preferred mortgage on a vessel does not prevent a subsequent lien for repairs or supplies. Secondly, such being the case, the mortgagee can then require that such liens, even though junior, be paid when due or within a certain period of time, on pain of calling the mortgage. That is all that was done by the mortgagee in the case before this Court.

X.

The Balance of Equities Is in Favor of Appellee.

Appellants are seeking a windfall by raising hypertechnical objections to the appellee's mortgages.

At the time Crofton expended his labor and gave his materials to the owners of the "FLYING CLOUD," he fully knew that he was taking a lien therefor that was after appellee's mortgages. He was satisfied to do business on that basis. The District Court's decree places him exactly where he expected to be when he did the work. Wherein is that inequitable?

The same can be said as to appellant Larson. He did work on the vessel when there were two preferred mortgages out, and did the greater part of his work after Crofton placed his third preferred mortgage on the vessel. Larson either knew, or is chargeable with knowledge, of the existence of the preferred mortgages since all three mortgages were recorded and endorsed on the vessel's document. So he was content to rely on the owners' personal credit, and to be after the mortgagees insofar as his lien was concerned. Again, the decree of the District Court gives him exactly what he bargained for. Appellant Larson has not received inequitable treatment.

XI.

There Has Been No Waiver of the Preferred Status of Appellee's Mortgages.

Appellee has covered this point in the preceding paragraphs, especially paragraph IX, and will not repeat the argument here.

XII.

Conclusion.

The District Court's decision that the mortgages of the appellee Puget Sound National Bank of Tacoma contained no stipulation that the appellee waived the preferred status thereof, was a decision that is based on a reasonable interpretation of the mortgages and the evidence in the case, and the appellants have pointed out no evidence that could overthrow the strong presumption in favor of the decree below.

The appellants' argument that a preferred mortgage must prohibit any and all liens in order to prevent a repair or supply lien from attaching and becoming prior to the lien of the mortgagee, does not state correct law. The Ship Mortgage Act gives the preferred mortgage priority over supply-repair liens.

Therefore, appellee's mortgages have priority over appellants' supply-repair liens, and the decree of the District Court should be affirmed.

Respectfully submitted,

HERBERT R. LANDE and
CHARLES H. KENT,
By HERBERT R. LANDE,

Attorneys for Appellee Puget Sound National Bank of Tacoma.

No. 13225

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CROFTON DIESEL ENGINE COMPANY, INC., a corporation, and AL LARSON BOAT SHOP, a corporation,

Appellants,

vs.

PUGET SOUND NATIONAL BANK OF TACOMA, a corporation, and ETS-HOKIN & GALVAN,

Appellees.

REPLY BRIEF FOR APPELLANTS.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 13225

IN THE

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FOR THE NINTH CIRCUIT

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PUGET SOUND NATIONAL BANK OF TACOMA, a corporation, and ETS-HOKIN & GALVAN,

Appellees.

REPLY BRIEF FOR APPELLANTS.

Introduction.

Appellants in their reply brief, propose merely to clarify some of the errors in Appellee's Brief. No effort will be made to restate or reargue Appellants' position.

I.
Question of Law or Fact.

Discussion of whether there is before the Appellate Court a question of law or fact seems easily resolved by the fact that this appeal is concerned with the narrow question: What is the legal effect of Appellee's documents which call themselves "Preferred" ship's mortgages? This is a question of law and has so been consistently held by this Court whenever interpretation of a writing is before the Court.

II.

Waiver by the Mortgage Terms.

A mortgagee can waive his right to a preferred mortgage lien at any time. (46 U. S. C. A. 974.)

If, for example, the mortgage had specifically stated that the mortgagor was authorized to incur maritime liens for "strictly current operations and repairs," there could be no argument but that a waiver had been made under the statute. If the wording of the exception to the clause prohibiting liens were similar to that in *The Henry W. Breger* (D. C. Md. 1927) (17 F. 2d 423, 432) (where the mortgagor was specifically prohibited from incurring any liens except for supplies) there would be a "tacit permission" for the imposition of a lien on the ship, and the preferred status of the mortgage would be waived *pro tanto.* The question here is whether Appellee, by choice of the mortgage form it used has waived its seniority to these maritime liens.

III.

How the Mortgages Waive Their "Preferred" Status.

The mortgagee in this case has waived its priority as to these lien holders:

(a) By use of a form designed for a situation in which it is assumed that the maritime liens for "strictly current operations and repairs" will be prior to the mortgage.

(b) Use of a form that, at least tacitly, authorizes the Vessel to be "run in debt," and the credit of the Vessel to be pledged for "strictly current operations and repairs."

(c) Use of a form that sets a ceiling on the time the liens can be outstanding (*i. e.,* they must be paid in 30 days).

(d) Failing to include the simple prohibition by the mortgagee of the mortgagor's authorization to give any paramount security on the ship, as was done in the *Morse Dry Dock & Repair Co. v. Northern Star* (1926, 271 U. S. 552, 46 S. Ct. 489, 70 L. Ed. 1082), and in *The Bergen* (C. C. A. 9th, 1933, 64 F. 2d 877) cases.

(e) Use of language (concerning running the Vessel in debt for a reasonable sum for strictly current operations and repairs to be kept currently paid within 30 days of date incurred) which is ambiguous, and should be construed most strongly against him who chooses it.

IV.

Status of Crofton's Mortgage as Security for Its Maritime Lien.

Crofton's note and mortgage was given as "evidence and security for goods, wares and services furnished the Vessel on order of the Respondents." (See Offer to Stipulate and Acceptance A. 67, 71.) Crofton, with knowledge, constructive or actual, of the presence of two documents calling themselves "Preferred" mortgages, is taken to have been aware of the existence of some rights or claimed rights arising out of Appellee's mortgages. What these rights were, he need not have decided. If they were only chattel mortgages when

they compete with maritime liens, his knowledge or belief is completely immaterial, when determining his rights. In charging him with being estopped to contest the validity of these mortgages, Appellee now seems to say that he should have resolved the ambiguous clauses concerning running the Vessel in debt (and of course charging the Vessel's credit for supplies and other reasonable expenses of operation) at his peril. This, the Supreme Court, in *The Stjerneborg* (1940, 310 U. S. 268, 60 S. Ct. 937, 84 L. Ed. 1197), was not a decision required of the supplier.

What if Appellee's mortgages had had the defect noted in the case of *Morse Dry Dock & Repair Co. v. Northern Star* (1926, 271 U. S. 552, 46 S. Ct. 489, 70 L. Ed. 1082)? Would then Crofton's designation of his preferred mortgage as "third" have precluded his security from being senior? Appellants here urge that the defect in Appellee's mortgages by reason of the *pro tanto* waiver of preferred status to maritime liens for "a reasonable sum for strictly current operations and repairs" is a much more serious defect.

Crofton, to bolster his maritime lien, sought the best security he could get and obtained a mortgage "third" in time of attaching. It is subsequent to Appellee's mortgages only if those mortgages are valid against his maritime lien. It is axiomatic that the Court, particularly the Admiralty Court, will regard the substance and not the form, and should, as Admiralty has done on many occasions, dispose of the entire problem. Ap-

pellee's statement that Crofton should have forclosed its maritime lien rather than to attack the security for the lien seems to be only an effort to disregard substance for form.

V.

Appellee's Cases Are Out of Point.

Appellants point out that in the case of the *Nan B* (D. C. Alaska 1948), 78 Fed. Supp. 748, relied upon heavily by Appellees, there was no question of waiver in the earlier mortgages. The subsequent mortgagee based his claim of priority on an alleged defect in the execution of the prior mortgage. We also doubt if the *Morse Dry Dock* case was brought to the Court's attention, because no mention is made of it. The District Court's reasoning seems at odds with that of the Supreme Court in the *Morse* case. The *Nanking* (D. C. Cal. 1923), 292 Fed. 642, upon which the *Nan B* is based, is, of course, overruled by the *Morse* case.

Appellants also rely upon the case of *Collier Advertising Service v. Hudson River Day Line* (S. D. N. Y. 1936), 14 Fed. Supp. 335 (aff'd C. C. A. 2d, 1937). 93 F. 2d 459). In this case, though there was a contest between maritime liens and a preferred mortgage, there was no question as to waiver of the status of the preferred mortgage due to ambiguity in the language or contents of the mortgage. The Circuit Court of Appeals, it may be noted, affirmed because the supplies were not delivered to the individual Vessels upon which the liens were claimed and therefore, no maritime liens ever arose.

VI.

The "Charter Party Rule" Applies to Preferred Mortgage Cases.

The reasoning of the Courts in Charter Party cases in similar situations in which the person in possession of a Vessel with apparent authority to pledge its credit is based upon sound principles of justice, precedent and the statutes, particularly Sections 971, 972 and 973 of 46 U. S. C. It is to be noted that the mortgagor in this case is a person authorized by Section 971 to create liens, and is a person to whom the management of the Vessel is entrusted (Sec. 972) if the Mortgagee is, in a sense, regarded as an "owner." The key in the Charter Party cases is Section 973, with reference to notice to the supplier. Can the supplier, Appellants in this case, be taken to have had knowledge, constructive or actual, that the mortgagor was "without authority to bind the Vessel therefor" (Sec. 973) when the document used for this "preferred" mortgage assumes that the Vessel will be run in debt, and its credit will be pledged "for strictly current operations and repairs" and all the mortgagee is retaining is the right to accelerate if these 30-day liens are not paid in the time specified? These same considerations have been presented to the Courts in the Charter Party cases, and in all other cases involving similar contests, including the few preferred mortgage cases we have located.

VII.

Discussion of the Bergen.

In this case (C. C. A. 9th, 1933, 64 F. 2d 877), relied upon by Appellee for the proposition that the preferred mortgage is senior to maritime liens, it is to be noted that there was an express prohibition of the power and authority of the mortgagor "to create, incur, or permit to be placed or imposed upon the property subject or to become subject to his mortgage, *any lien whatsoever.*" It should be noted that this Court discussed a subsequent ambiguity in the terms of the mortgage by which the mortgagor was obligated to pay off any liens in 15 days. But the case was placed squarely upon the grounds Appellants here assert—*seniority of the mortgage depends upon the express prohibition of the authority of the mortgagor to incur any liens!* In the *Bergen* case, there was such express prohibition and the maritime liens were postponed. In the case at bar there was no such prohibition, but there was a tacit permission, or an ambiguity or an assumption that there would be imposed for "strictly current operations and repairs."

VIII.

Conclusion.

Appellants therefore submit that the District Court's decree is erroneous and should be reversed.

Respectfully submitted,

EKDALE, SHALLENBERGER & TONER,

By ARCH E. EKDALE,

GORDON P. SHALLENBERGER,

GEORGE E. TONER,

Proctors for Appellants.

No. 13226

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

JOHN PHILLIP WHITE,

Appellee.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 92)

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

INDEX PAGE

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Appellee.

In the United States District Court, Northern District of California, Southern Division
No. 27740H

JOHN PHILLIP WHITE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR DAMAGES

Now comes plaintiff and for cause of action against defendant alleges as follows:

I.

This action is brought pursuant to the Federal Tort Claims Act.

II.

At all times herein mentioned, plaintiff was and now is a resident of the City and County of San Francisco, State of California, which said City and County is located within the Northern District of California, Southern Division.

III.

At all times herein mentioned, the United States of America owned and operated an Army base known as Camp Beale, located at Marysville, California.

IV.

At all times herein mentioned, plaintiff was and now is the employee of Mars Metal Company, a co-partnership, with its place of business located at 1200 Minnesota Street, San Francisco, California.

V.

On or about November 18, 1946, said Mars Metal Company entered into a written contract with the United States of America for the collection of metal scrap at Camp Beale, California.

VI.

On November 22, 1946, pursuant to said contract, plaintiff was supervising on behalf of said Mars Metal Company the collection of scrap metal from the strafing range adjacent to firing ranges 9 and 10B at Camp Beale, to the knowledge of defendant United States of America, its agents, servants, and employees. At said time and place, the United States of America through its agents, servants and employees, negligently and carelessly permitted unexploded shells to remain on said strafing range and negligently and carelessly failed and neglected to warn plaintiff of the presence of the same.

VII.

As a result of said negligence and carelessness, plaintiff discarded what appeared to be a non-explosive shell, and the same thereupon exploded in his immediate presence, fragments thereof penetrating both of the plaintiff's feet and legs, and causing the following injuries:

(a) Severe lacerations over both feet and legs.

(b) Injury to the nerves, muscles and tendons in both feet and legs.

(c) Fracture of bones in both feet.

(d) Limitation of motion in left ankle.

(e) Callouses on both feet.

(f) Severe nervous shock, pain and suffering.

VIII.

For sometime prior to said accident, plaintiff was employed as a salesman, and his earnings from said employment were approximately Two Hundred Fifty Dollars ($250.00) per month. As a result of said negligence and carelessness and said injuries, plaintiff was unable to engage in said employment for a period of seventeen (17) weeks, to his damage in the sum of One thousand Dollars ($1000.00).

IX.

As a result of said negligence and said carelessness and said injuries, plaintiff was compelled to engage the services of physicians and surgeons, and will continue to require the services of physicians and surgeons. The cost of said services of physicians and surgeons to date hereof is the sum of Five Hundred Dollars ($500.00), and said sum is the reasonable cost and value thereof. Plaintiff does not know the cost of services to be rendered by said physicians and surgeons, and ask leave to insert said cost when the same shall have been ascertained.

X.

As a result of said negligence and said carelessness and said injuries, plaintiff has been compelled to obtain X-rays, drugs, and hospitalization. The costs of said X-rays, drugs, and hospitalization are Thirty-five Dollars ($35.00), Fifty Dollars ($50.00), and Three Hundred Dollars ($300.00) respectively, and said sums were and are the reasonable cost and value thereof. Plaintiff is informed and be-

lieves and therefore alleges that he will be required to obtain further X-rays, drugs, hospitalization, the exact cost of which is unknown to him, and therefore prays leave to insert the exact cost of such further X-rays, drugs, and hospitalization when the same shall have been ascertained.

XI.

As a result of said explosion and said accident, the topcoat, shoes, and pants that plaintiff was then and there wearing were completely destroyed. The reasonable value of said topcoat, shoes and pants was Sixty-five Dollars ($65.00), Fifteen Dollars ($15.00), and Eight Dollars ($8.00) respectively.

XII.

By reason of the foregoing facts, plaintiff has been damaged in the sum of Thirty-six Thousand Nine Hundred Seventy-Three Dollars ($36,973.00), no part of which has been paid.

Wherefor plaintiff places judgment against the defendant in the sum of Thirty-six Thousand Nine Hundred Seventy-Three Dollars ($36,973.00), together with interest and costs incurred herein, and such other and further relief as this Court may deem just and proper.

/s/ M. S. HUBERMAN,

/s/ LEONARD J. BLOOM,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed November 12, 1947.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes now defendant United States of America, and answering plaintiff's complaint on file herein, denies and alleges as follows:

I.

Denies the allegations of Paragraphs VII and XII and the portions of Paragraph VI beginning with the words "At said time," line 17, page 2, to and including the words "the same," line 21, page 2, and the portion of Paragraph VIII beginning with the word "As," line 8, page 3, to and including the figures "($1000.00)," line 12, page 3, and the portion of Paragraph IX beginning with the words "As a result," line 14, page 3, to and including the word "surgeons," line 17, page 3; and the portion of Paragraph X beginning with the words "As a result," line 24, page 3, to and including the word "hospitalization," line 26, page 3; and the portion of Paragraph XI, beginning with the words "As a result," line 6, page 4, to and including the word "destroyed," line 8, page 4; and denies that plaintiff has been damaged in the sum of $36,973.00 or any part thereof, or in any sum or amount or at all.

II.

Said answering defendant has no information upon the subject sufficient to enable it to form a belief as to the truth of the allegations contained in Paragraph IV, the portion of Paragraph VIII,

beginning with the words "For sometime," line 6, page 3, to and including the word "month," line 8, page 3; the portion of Paragraph IX beginning with the words "The cost," line 17, page 3, to and including the word "ascertained," line 22, page 3; the portion of Paragraph X beginning with the words "The costs," line 26, page 3, to and including the word "ascertained," line 4, page 4, and the portion of Paragraph XI, beginning with the words "The reasonable," line 8, page 4, to and including the word "respectively," line 10, page 4, and, therefore, and basing its denial upon that ground, said defendant denies each and all of said allegations.

III.

Further answering said complaint and as a separate defense thereto, said defendant alleges that the accident and injuries and damages complained of, if any, were due to and caused by an unavoidable accident.

IV.

Further answering said complaint and as a separate defense thereto, said defendant alleges that the conditions complained of in said complaint were open, patent and obvious conditions and were known to the plaintiff herein, and that said plaintiff assumed the risk of injury from said conditions.

V.

Further answering said complaint and as a separate defense of contributory negligence thereto, said defendant alleges that the accident and injuries

and damages complained of, if any, were due to and caused by plaintiff's own *careless* and negligence proximately contributing thereto and alleges that said plaintiff, upon the occasion referred to in the complaint, failed to use his eyes and other faculties, failed to use ordinary care and caution to protect himself from injury and carelessly and negligently picked up, handled and dropped the explosive object referred to in the complaint and otherwise carelessly and negligently conducted himself upon said occasion thereby proximately contributing to the cause of the accident and injuries and damages complained of, if any there were.

Wherefore, said defendant prays that plaintiff take nothing by his complaint herein and that said defendant be hence dismissed with its costs.

FRANK J. HENNESSY,
United States Attorney,

By /s/ DANIEL C. DEASY,

/s/ DANIEL C. DEASY,
Assistant United States Attorney, Attorneys for Defendant, United States of America.

[Endorsed]: Filed July 14, 1948.

[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED BY PLAINTIFF

To the United States of America, the above-named defendant, and to Frank J. Hennessy, United States Attorney, and Daniel C. Deasy, Assistant United States Attorney:

You, or any officer or agent of the United States Government who shall furnish such information as is available, are hereby required to answer separately and fully in writing the following interrogatories:

(1) What are the full names, Army ranks and titles of the officers at Camp Beale, Marysville, California in charge of the decontamination of the strafing range adjacent to Firing Ranges 9 and 10B at said Camp Beale on or before November 22, 1946?

(2) Were there any United States Army regulations governing the decontamination of firing ranges of Army installations prior to the admission of civilians to said ranges for the purpose of collecting scrap metal therefrom, in existence on or before November 22, 1946?

(3) If your answer to question (2) is in the affirmative, then state what said regulations were and where the same may be found.

(4) Were there any Army regulations issued by the Adjutant General's Office or other competent

Army authority on or before November 22, 1946, regulating or governing the decontamination of firing ranges at Camp Beale, Marysville, California preparatory to the admission of civilians thereon for the purpose of collecting scrap metal pursuant to contracts with the United States Army?

(5) If your answer to question (4) is in the affirmative then state what such regulations were in detail and where the same may be found.

(6) If your answers to questions (2) and (4), or either of them, are in the affirmative, then state whether such regulations were carried out at Camp Beale on or before November 22, 1946, in respect to the strafing range adjacent to Firing Ranges 9 and 10B.

(7) State the dates when and the manner in which the strafing range adjacent to Firing Ranges 9 and 10B at Camp Beale were decontaminated during the six month period prior to November 22, 1946.

(8) Describe in detail the dates when and the manner in which the strafing range adjacent to Firing Ranges 9 and 10B at Camp Beale, Marysville, California, was decontaminated during the six month period immediately prior to November 22, 1946.

(9) During what period of time immediately prior to November 22, 1946, was the strafing range adjacent to Firing Ranges 9 and 10B at Camp

Beale, Marysville, California used by the United States Army for target practice purposes?

(10) During what period of time immediately prior to November 22, 1946, were Firing Ranges 9 and 10B, and the adjacent firing or practice ranges, used for target practice?

(11) Was any warning of danger given by any Army officer or other Army personnel to the plaintiff prior to his entry on said strafing range at Camp Beale, on November 22, 1946?

(12) If your answer to question (11) is in the affirmative, then give the name or names of the officers or Army personnel giving such instructions and the precise nature of the instructions or warning, if any, given.

Dated February 23, 1949.

/s/ M. S. HUBERMAN,

/s/ LEONARD J. BLOOM,
Attorneys for Plaintiff.

[Endorsed]: Filed February 23, 1949.

[Title of District Court and Cause.]

STIPULATION RESPECTING FILING OF FIRST AMENDED COMPLAINT

It is hereby stipulated by and between counsel for defendant and counsel for plaintiff that plaintiff may file herein his First Amended Complaint for

Damages, which said Complaint is attached hereto, and that each and every allegation contained therein which does not appear in plaintiff's original complaint shall be deemed denied by defendant.

Dated September 29, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ RUDOLPH J. SCHOLZ,
Assistant United States Attorney, Attorneys for Defendant, United States of America.

/s/ M. S. HUBERMAN,

/s/ LEONARD J. BLOOM,
Attorneys for Plaintiff.

[Endorsed]: Filed October 2, 1950.

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT FOR DAMAGES

Now Comes plaintiff and for cause of action against defendant alleges as follows:

I.

This action is brought pursuant to the Federal Tort Claims Act.

II.

At all times herein mentioned, up to the 15th day of July, 1950, plaintiff was a resident of the

City and County of San Francisco, State of California, which said City and County is located within the Northern District of California, Southern Division. Since said date plaintiff was and now is a resident of Sausalito, County of Marin, State of California, which said city of Sausalito is located within the Northern District of California, Southern Division.

III.

At all times herein mentioned, the United States of America owned and operated an Army base known as Camp Beale located at Marysville, California.

IV.

At all times herein mentioned, until April, 1949, plaintiff was the employee of Mars Metal Company, a co-partnership, with its place of business at 1200 Minnesota Street, San Francisco, California. Plaintiff left the employ of said Mars Metal Company on said date.

V.

On or about November 18, 1946, said Mars Metal Company entered into a written contract with the United States of America for the collection of metal scrap at Camp Beale, California.

VI.

On November 22, 1946, pursuant to said contract, plaintiff was supervising on behalf of said Mars Metal Company the collection of scrap metal from the strafing ranges adjacent to Firing Ranges 9 and

10B at Camp Beale, to the knowledge of defendant United States of America, its agents, servants, and employees. At said time and place, the United States of America through its agents, servants and employees, negligently and carelessly permitted unexploded shells to remain on said strafing range and negligently and carelessly failed and neglected to warn plaintiff of the presence of the same.

VII.

As a result of said negligence and carelessness, plaintiff discarded what appeared to be a non-explosive shell, and the same thereupon exploded in his immediate presence, fragments thereof penetrating both of plaintiff's feet and legs, and causing the following injuries:

(a) Severe lacerations over both feet and legs.

(b) Injury to the nerves, muscles and tendons in both feet and legs.

(c) Fracture of bones in both feet.

(d) Limitation of motion in left ankle.

(e) Callouses on both feet.

(f) Severe nervous shock, pain and suffering.

VIII.

For some time prior to said accident, plaintiff was employed as a metal salesman, and his earnings from said employment were approximately Two Hundred and Fifty Dollars ($250.00) per month. As a result of said negligence and carelessness and said injuries, plaintiff was unable to engage in his said employment for a period of seventeen (17) weeks to his damage in the sum of One Thousand

Dollars ($1,000.00). Thereafter plaintiff was unable to engage in said employment for a period of fifteen (15) weeks to his further damage in the sum of approximately One Thousand Four Hundred Dollars ($1,400.00). As a result of said negligence and carelessness and said injuries, plaintiff was able to engage in said employment in a limited capacity only for a period of twenty-three (23) months, to this further damage in the sum of approximately Two Thousand Three Hundred Dollars ($2,300.00).

IX.

As a result of said negligence and carelessness, and said injuries, plaintiff was compelled to engage the services of physicians and surgeons. The cost of said services of said physicians and surgeons was and is the sum of Eight Hundred Eighty Dollars and Sixty-seven Cents ($880.67), and said sum was and is the reasonable cost and value thereof. Plaintiff is informed and believes and therefore alleges that he will continue to require the services of physicians and surgeons in the treatment of said injuries in the future, and plaintiff is informed and believes and therefore alleges that the cost of said future services will be in excess of One Thousand Dollars ($1,000.00), which said sum was and is the reasonable value and cost thereof.

X.

As a result of said negligence and said carelessness and said injuries, plaintiff has been compelled

to obtain X-rays, drugs and hospitalization. The cost of said X-rays, drugs and hospitalization is and was the sum of Forty-five Dollars ($45.00), Fifty Dollars ($50.00), and Two Thousand One Hundred Six Dollars and Seventy-two Cents ($2,-106.72) respectively, and said sums were and are the reasonable value thereof. Plaintiff is informed and believes and therefore alleges that said injuries will require further hospitalization, and that the cost thereof will exceed the sum of One Thousand Dollars ($1,000.00).

XI.

As a result of said explosion and said accident, the topcoat, shoes, and pants that plaintiff was then and there wearing were completely destroyed. The reasonable value of said topcoat, shoes and pants was Sixty-five Dollars ($65.00), Fifteen Dollars ($15.00) and Eight Dollars ($8.00) respectively.

XII.

As a result of said carelessness, negligence and said injuries, plaintiff required the use of canes and crutches. The cost of said canes and crutches was and is the sum of Thirty Dollars ($30.00), and said sum was and is the cost thereof.

XIII.

As a result of said carelessness, negligence and said injuries, plaintiff required the services of an ambulance from Camp to Mary's Help Hospital, San Francisco, California. The cost of said ambulance was and is the sum of One Hundred Fifteen

Dollars ($115.00), and said sum was and is the reasonable cost and value thereof. And thereafter on December 25, 1946, as a result of said negligence, carelessness and said injuries, plaintiff again required the services of an ambulance, the cost of which was and is the sum of Thirteen Dollars ($13.00), and said sum was and is the cost and value thereof.

XVI.

By reason of the foregoing facts plaintiff has been damaged in the sum of Sixty Thousand Twenty-eight Dollars and Thirty-nine Cents ($60,028.39), no part of which has been paid.

Wherefore, plaintiff prays judgment against defendant in the sum of Sixty Thousand Twenty-eight Dollars and Thirty-nine Cents ($60,028.39), together with interest and costs incurred herein, and such other and further relief as this court may deem just and proper.

/s/ M. S. HUBERMAN,

/s/ LEONARD J. BLOOM,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed October 2, 1950.

[Title of District Court and Cause.]

MOTION FOR PRODUCTION OF DOCUMENTS

Plaintiff, John Phillip White moves the court for an order requiring defendant United States of America to produce and to permit plaintiff to inspect and to copy each of the following documents:

(1) All of the X-rays and medical records of or concerning the physical condition and treatment of plaintiff John Phillip White for the period from November 22, 1946, to and including November 27, 1946, which were made and filed by the United States Army at Camp Beale, California.

(2) The decontamination records of the United States Army for firing ranges 9 and 10B and the strafing range adjacent thereto, at Camp Beale, California for the period of January 1, 1944, to and including November 22, 1946.

(3) The range firing records for firing ranges 9 and 10B, and the adjacent firing and strafing ranges, at Camp Beale, California for the period of January 1, 1944, to and including November 22, 1946.

(4) War Department Circular 195 dated June 29, 1945, respecting decontamination procedure.

(5) The memorandum issued by the Post Operation Officer at Camp Beale, California in compliance with Section I of said War Department Circular 195.

(6) The memorandum issued by the Assistant Post Range Officer, Camp Beale, California, to Major Hermansen, Post Training Office, dated October 17, 1944, the same being a report of de-dudding operations accomplished on or about October 14, 1944.

(7) Statement of Technical Sergeant Frank C. Hodges, Serial No. 39531493, Headquarters Department, Post Operating Company 6007, Army Service Unit, Camp Beale, California dated January 29, 1947.

(8) Newspaper releases issued by Captain Robert Sumner Jones, as Public Relations Officer, to the newspapers near Camp Beale, California, issued a short time prior to November 22, 1946, on the subject of the existence of duds on the firing ranges at Camp Beale, California.

(9) The memorandum from said Captain Robert Sumner Jones to the President of the Sheep Herder's Association, Marysville, California, issued a short time prior to November 22, 1946, which said memorandum contained a warning of the possibility of the presence of high explosive ammunition on the firing ranges at Camp Beale, California.

Defendant United States of America has the possession, custody or control of each of the foregoing documents, and each of said documents constitutes and contains evidence relative and material to a matter involved in the above-entitled action, as is more particularly set forth in the Affidavit of

Leonard J. Bloom, attached hereto marked Exhibit "A" and made a part hereof.

/s/ M. S. HUBERMAN,

/s/ LEONARD J. BLOOM,
Attorneys for Plaintiff.

Notice of Motion

To: Frank J. Hennessey, United States Attorney; Rudolph J. Scholz, Assistant United States Attorney; and to defendant United States of America.

Please take notice that the undersigned will bring the above motion for production of documents, papers and records under Rule 34 on for hearing before this Court at Room 338 United States District Court, Post Office Building, San Francisco, California on the 9th day of October, 1950, at 10:00 o'clock a.m. of that day or as soon thereafter as counsel may be heard.

/s/ M. S. HUBERMAN,

/s/ LEONARD J. BLOOM,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed October 3, 1950.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR ORDER TO PRODUCE DOCUMENTS

State of California,
City and County of San Francisco—ss.

Leonard J. Bloom, being first duly sworn, deposes and says:

I am one of the attorneys for John Phillip White, the plaintiff in the above-entitled action, and the facts herein stated are within my knowledge.

(1) The above-entitled action is an action brought pursuant to the Federal Tort Claims Act to recover damages in the sum of Sixty Thousand Twenty-eight Dollars and Thirty-nine Cents ($60,028.39) for injuries sustained by plaintiff as a result of the explosion of a shell on a strafing range on November 22, 1946, at Camp Beale, California.

(2) The accident occurred when plaintiff was supervising on behalf of the Mars Metal Company of San Francisco the collection of scrap metal from the strafing ranges adjacent to firing ranges 9 and 10B at said Camp Beale pursuant to a certain contract by and between said Mars Metal Company and the United States of America for the collection of scrap metal at Camp Beale, California. Reference is hereby made to the First Amended Complaint on file herein and by such reference said complaint is incorporated herein as though the same were herein set forth in full. As more particularly appears from said First Amended Complaint, said accident

and the injuries sustained by plaintiff were caused by the negligence of the United States of America, and its agents, servants and employees, in permitting unexploded shells to remain on the strafing range in question, and in failing and neglecting to warn plaintiff of the presence of the same.

(3) This action was commenced by the filing of a complaint and the service of summons on or about the 12th day of November, 1947. Defendant United States of America duly appeared and issue was joined by the service on the 19th of January, 1948 of defendant's answer. Thereafter, on or about the .. day of September, 1950, plaintiff filed his First Amended Complaint pursuant to stipulation, which said stipulation provides that all of the allegations contained therein and not appearing in plaintiff's original complaint should be deemed denied by defendant United States of America.

(4) There will be presented to the court, at the hearing of this motion, all of the pleadings in this action. Such pleadings are hereby made a part of this affidavit with the same force and effect as if the same were herein set forth in full.

(5) Plaintiff has been heretofore advised by the United States of America of the existence of all of the papers, records and documents set forth in said motion. All of said papers, records and documents contain information relative to the issues involved in the above-entitled action for the following reasons:

(a) Said X-rays and medical records: these records were made and kept by the medical department of the United States Army at Camp Beale, California, where plaintiff was treated for his injuries from November 22, 1946, to and including November 27, 1946. Said X-rays and records show the extent of the original injuries sustained by plaintiff as a result of the accident and the treatment provided for the same.

(b) Said decontamination records: these records were made by the United States Army at Camp Beale, California, and reveal the nature and extent of the negligence of the defendant in failing to properly decontaminate the area in which the accident occurred.

(c) Said range firing records: these records were likewise kept in the regular course of the operation of the United States Army at Camp Beale, California, for the period immediately prior to the accident in question and show the extent and nature of the firing of explosive material on or near the strafing range on which the accident occurred, and further show the likelihood of such explosive material being present at the time of the accident, the negligence of the defendant in failing to detect the same, and the knowledge of the defendant of such explosives.

(d) Said War Department Circular 195 dated June 29, 1945: the existence of this circular in the possession of the defendant United States of America is shown by the reference thereto on pages 2 & 3 of the response of Captain Robert Sumner Jones to the Interrogatories propounded by plaintiff in

said action; a copy of said response is attached hereto marked Exhibit "B" and made a part hereof. Said circular contains information respecting the procedure used by the United States Army to decontaminate firing and strafing ranges. Plaintiff proposes to show in the trial of this action that said instructions were not adequate and that in any event defendant failed and neglected to comply with the same.

(e) Said memorandum issued by the Post Operation Officer complying with Section I of said Circular 195: the existence of this memorandum in the possession of the defendant is shown by the reference thereto on Page 2 of the attached Exhibit "B." Said memorandum contains information respecting the purported compliance of the responsible army officers at Camp Beale, California, prior to the accident in question, with the decontamination procedure specified in said War Department Circular 195, and affiant is informed and believes and therefore alleges that said memorandum will show that said officers failed and neglected to comply with the requirements of said Circular 195.

(f) Said memorandum issued by the Assistant Post Range Officer to Major Hermansen, Post Training Office, dated October 17, 1944: the existence of the memorandum in the possession of the defendant United States of America is likewise shown by reference thereto on Page 3 of the attached Exhibit "B." This memorandum contains information respecting the attempt of the responsible officer to accomplish de-dudding operations on

the range on which the accident occurred on said date. This report is of particular importance since it is contended by said Captain Robert Sumner Jones that no high explosive ammunition was fired on the range in question after the said date and prior to the date of the accident in question, as more particularly appears on page 3 of said Exhibit "B."

(g) Said statement of Technical Sergeant Frank C. Hodges: the existence of this statement in the possession of the United States Attorney's office is shown by the reference thereto on page 4 of said Exhibit "B" where the same is referred to as "Exhibit L." Said Frank C. Hodges was Range Sergeant at Camp Beale at the time of the accident and conducted plaintiff over the area where the accident occurred immediately prior thereto. Said Frank C. Hodges was and is familiar with the strafing and firing practices at Camp Beale for a period of time immediately prior to the accident, as well as with the decontamination procedure used at Camp Beale at said time. Therefore his statement should contain information related to the danger of the area in question and the steps, if any, taken by the United States Army to render the areas in question safe for the purpose used.

(h) Said newspaper releases issued by Captain Robert Sumner Jones, as Public Relations Officer: the existence of said releases in possession of the United States government is shown by reference thereto on page 4 of said Exhibit "B." Affiant is informed and believes and therefore alleges that said releases will show knowledge upon the part of

the officers in control of the area in which the accident occurred of the dangers existing at the time of the accident.

(i) Said memorandum from Captain Robert Sumner Jones to the President of the Sheep Herder's Association: the existence of said memorandum is shown by the reference thereto on page 4 of said Exhibit "B" and said memorandum likewise contains information showing knowledge upon the part of the responsible officers of the danger existing in the area where the accident occurred.

(6) None of the said documents or records are in the possession or under the control of plaintiff or his attorneys nor has he any copies thereof or extracts therefrom and he is wholly ignorant of their precise contents. Each and every one of the aforesaid documents, papers and records are in the possession or under the control of the defendant, and plaintiff and his attorneys know of no way to obtain a knowledge thereof except by ordering defendant to make discovery thereof.

(7) Plaintiff has a good and meritorious cause of action herein and all of said papers, records and documents are material and necessary to the plaintiff to enable him to prepare for trial, and he cannot proceed to trial without them.

(8) This application is made in good faith for the purposes stated and none other, and plaintiff and his attorneys intend to use each and everyone of said documents, papers and records on the trial of said action.

Wherefore affiant respectfully applies to this court for an order requesting defendant United States of America to produce and discover, or to give an inspection and copy of, or permission to take a copy of, each and everyone of the aforesaid documents and records, and to deposit each and everyone of said documents and records in the office of the clerk of this court or elsewhere, as the court shall direct, where they shall remain subject to examination of plaintiff's attorneys during ordinary business hours, for such a period as the court shall direct; and to permit plaintiff and his attorneys to take photographic copies of any such records, papers and documents as he shall require.

/s/ LEONARD J. BLOOM,

Subscribed and sworn to before me this 3rd day of October, 1950.

[Seal] /s/ JEROME SOCK,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires February 7, 1952.

EXHIBIT "B"

(Copy)

State of Texas,
County of Harris—ss.

Statement of Robert Sumner Jones in response to the interrogatories propounded by plaintiff in the case of John Phillip White vs. United States of America in the United States District Court, Northern District.

The witness being duly sworn answered the propounded interrogatories as follows:

Interrogatory one: What are the full names, Army ranks and titles of the officers at Camp Beale, Marysville, California in charge of the decontamination of the strafing range adjacent to Firing Ranges 9 and 10B at said Camp Beale on or before November 22, 1946:

Answer: Elmer P. Chipman, 2nd Lt., AUS, Assistant Range Officer. On or about October, 1944, length of tour unknown. Names of intermediate range officers from that date until July, 1946, unknown to me. I was assigned as Post Range Officer on or about July, 1946, and was in that capacity at the time of the alleged accident, 22 November, 1946.

Second Interrogatory: Were there any United States Army regulations governing the decontamination of firing ranges of Army installations prior to the admission of civilians to said ranges for the

purpose of collecting scrap metal therefrom, in existence on or before November 22, 1946?

Answer: Not to my knowledge.

Third Interrogatory: If your answer to question (2) is in the affirmative, then state what said regulations were and where the same may be found.

Answer: No remark.

Fourth Interrogatory: Were there any Army regulations issued by the Adjutant General's Office or other competent Army authority on or before November 22, 1946, regulating or governing the decontamination of firing ranges at Camp Beale, Marysville, California preparatory to the admission of civilians thereon for the purpose of collecting scrap metal pursuant to contracts with the United States Army?

Answer: Not to my knowledge.

Fifth Interrogatory: If your answer to question (4) is in the affirmative then state what such regulations were in detail and where the same may be found.

Answer: No remark.

Sixth Interrogatory: If your answers to questions (2) and (4), or either of them, are in the affimative, then state whether such regulations were carried out at Camp Beale on or before November 22, 1946, in respect to the strafing range adjacent to Firing Ranges 9 and 10B.

Answer: No remark.

Seventh Interrogatory: State the dates when

and the manner in which the strafing range adjacent to Firing Ranges 9 and 10B at Camp Beale were decontaminated during the six month period prior to November 22, 1946.

Answer: There were no large scale decontamination operations of the impact areas of the said ranges during the 6 month period prior to 22 November, 1946, however, during this period of time normal demolition of duds discovered by persons having access to these areas was continuously accomplished in accordance with standard operating procedures as specified in a memorandum issued by the Post Operations Officer in compliance with Section I, WD circular 195, 29 June, 1945. Your attention is further invited to memorandum from Assistant Post Range Officer, Camp Beale, California, subject: Dud Clean-up of Range Areas, to Major Hermansen, Post Training Office, dated 17 October, '44, which is a report of de-dudding operations accomplished on or about 14 October, 1944. There was no firing of HE ammunition on those ranges from the time that these de-dudding operations were accomplished to the time of the alleged accident.

Eighth Interrogatory: State the dates when and the manner in which the strafing range adjacent to Firing Ranges 9 and 10B at Camp Beale were decontaminated during the six month period prior to November 22, 1946.

Answer: Your attention is invited to the answer of interrogatory No. 7.

Ninth Interrogatory: During what period of time immediately prior to November 22, 1946, was the strafing range adjacent to Firing Ranges 9 and 10B at Camp Beale, Marysville, California used by the United States Army for target practice purposes?

Answer: No HE type ammunition was fired on Ranges 9 and 10B during the period of time immediately prior to 22 November, 1946.

Tenth Interrogatory: During what period of time immediately prior to November 22, 1946, were Firing Ranges 9 and 10B, and the adjacent firing or practice ranges, used for target practice?

Answer: No HE type ammunition was fired during the period of time immediately prior to 22 November, 1946, on firing ranges 9 and 10B or the adjacent or practice ranges.

Eleventh Interrogatory: Was any warning of danger given by any Army officer or other Army personnel to the plaintiff prior to his entry on said strafing range at Camp Beale, on November 22, 1946?

Answer: Yes.

Twelfth Interrogatory: If your answer to question (11) is in the affirmative, then give the name or names of the officers or Army personnel giving such instructions and the precise nature of the instructions or warning, if any, given.

Answer: I, Robert Sumner Jones, at the time Captain, AC Attached, AUS, as Post Range Officer instructed Mr. John Phillip White, the plaintiff,

that in all probability duds existed in the Artillery Impace areas and areas adjacent thereto. Therefore, I instructed him that due caution should be practiced during his operations in these areas. I further instructed him in the event he discovered a dud, that he should not approach it beyond a safe distance to insure that the dud would not be disturbed; that he should mark the general locality, and immediately notify either myself or the provost marshall of its existence and location. Mr. White assured me that having been a Seabee on Saipan associated with demolition activities, he was familiar with safety precautions to be exercised in possible contaminated areas.

My range sergeant, T/Sgt. Frank C. Hodges, at that time informed me that he also gave a similar warning to Mr. White prior to Mr. White's admission to the range area. Your attention is invited to statement by T/Sgt. Frank C. Hodges, 39531493, Headquarters Detachment, Post Operating Company, 6007, Army Service Unit, Camp Beale, California, dated 29 January, 1947, listed as Exhibit L in the attached file.

I might add that a short time prior to the alleged accident, I as Public Relations Officer for the installation, arranged to have the local newspaper of greatest circulation carry an article advising the public of the possibility of existence of duds on the ranges, and advised the public of caution that should be practiced while in the area and procedure to be used in marking and reporting any duds that might be discovered. Furthermore, a short time prior to

the alleged accident, in the capacity of Post Operations Officer, I prepared a memorandum to the President of the Sheep Herder's Association for that locality with a request that he furnish a copy of same to all sheep herders who might have occasion to be in those areas. This memorandum contained a warning of a possibility of the presence of HE ammunition in the area and instructions governing their conduct in the proximity of these duds, also instructions regarding the marking of the locality and the reporting of it to proper authority. Elaborate measures were taken to warn and advise all persons of the possibility of the existence of unexploded HE projectiles on the military reservation of Camp Beale, California.

/s/ ROBERT S. JONES,
Captain, USAF.

State of Texas,
County of Harris.

Subscribed and sworn to before me this 14th day of November, 1949.

[Seal] /s/ JAMES S. HALL,
Notary Public in and for
Harris County, Texas.

My commisison expires June 1, 1951.

Receipt of copy acknowledged.

[Endorsed]: Filed October 3, 1950.

[Title of District Court and Cause.]

ORDER FOR PRODUCTION AND INSPECTION OF DOCUMENTS

The motion of plaintiff for the production and inspection of the hereinafter described papers, records and documents came on regularly before the above-entitled court, the Honorable Michael J. Roche presiding, on October 9, 1950, plaintiff appearing by M. S. Huberman and Leonard J. Bloom, his attorneys, and defendant appearing by Rudolph Scholz, Assistant United States Attorney. The court having read the Affidavit of Leonard J. Bloom in support of said motion, and being fully advised in the premises;

It is hereby Ordered, Adjudged and Decreed as follows:

(1) That the said motion be and the same is hereby granted in all respects;

(2) That service of a copy of this order with notice of entry thereof be made forthwith upon the United States Attorney at San Francisco, California;

(3) That defendant, United States of America, within five (5) days of the trial of the above-entitled action, which is now set for trial on October 25, 1950, deposit and leave with the clerk of this court the following books, records and documents:

(a) All of the X-rays and medical records of or concerning the physical condition and treatment of

plaintiff John Phillip White for the period from November 22, 1946, to and including November 27, 1946, which were made and filed by the United States Army at Camp Beale, California.

(b) The decontamination records of the United States Army for firing ranges 9 and 10B and the strafing range adjacent thereto, at Camp Beale, California, for the period of January 1, 1944, to and including November 22, 1946.

(c) The range firing records for firing ranges 9 and 10B and the adjacent firing and strafing ranges, at Camp Beale, California, for the period of January 1, 1944, to and including November 22, 1946.

(d) War Department Circular 195 dated June 29, 1945, respecting decontamination procedure.

(e) The memorandum issued by the Post Operation Officer at Camp Beale, California, in compliance with Section I of said War Department Circular 195.

(f) The memorandum issued by the Assistant Post Range Officer, Camp Beale, California, to Major Hermansen, Post Training Office, dated October 17, 1944, the same being a report of de-dudding operations accomplished on or about October 14, 1944.

(g) Statement of Technical Sergeant Frank C. Hodges, Serial No. 39531493, Headquarters Department, Post Operating Company 6007, Army Service Unit, Camp Beale, California, dated January 29, 1947.

(h) Newspaper releases issued by Captain Rob-

ert Sumner Jones, as Public Relations Officer, to the newspapers near Camp Beale, California, issued a short time prior to November 22, 1946, on the subject of the existence of duds on the firing ranges at Camp Beale, California.

(i) The memorandum from said Captain Robert Sumner Jones to the President of the Sheep Herder's Association, Marysville, California, issued a short time prior to November 22, 1946, which said memorandum contained a warning of the possibility of the presence of high explosive ammunition on the firing ranges at Camp Beale, California.

(4) That plaintiff John Phillip White, and his attorneys, be permitted to inspect all of the aforesaid records, papers and documents and make such copies and abstracts thereof as they may deem advisable.

Dated October 11th, 1950.

/s/ MICHAEL J. ROCHE,
Chief Judge,
U. S. District Court.

[Endorsed]: Filed October 11, 1950.

[Title of District Court and Cause.]

CLAIM OF LIEN

To the Honorable, the above-entitled court, and to defendant United States of America and the United States Attorney:

The undersigned, Industrial Indemnity Company,

a corporation, hereby requests the above-entitled court to determine and allow as a lien the sum of Four Thousand Four Hundred Thirty-eight and 54/100 Dollars ($4,438.54) against any judgment which may be made and entered in favor of plaintiff John Phillip White in the above-entitled action.

At the time of the accident and injuries set forth in the First Amended Complaint on file herein, plaintiff John Phillip White was acting within the course and scope of his employment by Mars Metal Company, 1200 Minnesota Street, San Francisco, California. At said time plaintiff was covered by a Workman's Compensation Insurance policy issued by the undersigned to said Mars Metal Company, and said Four Thousand Four Hundred Thirty-eight and 54/100 Dollars ($4,438.54) was paid for or on behalf of plaintiff by the undersigned pursuant to said policy.

This request and claim of lien is for:

(1) The reasonable expenses incurred by or on behalf of said plaintiff for medical treatment and hospitalization to cure and relieve him from the effects of the injuries set forth in the First Amended Complaint herein, in the sum of Three Thousand One Hundred Sixty-seven and 09/100 Dollars ($3,167.09).

(2) Reimbursement for temporary disability payments heretofore paid plaintiff John Phillip White by the undersigned in the sum of One Thou-

sand Two Hundred Seventy-one and 54/100 Dollars ($1,271.45).

INDUSTRIAL INDEMNITY COMPANY,

By /s/ J. V. CHAMBERS,
Lien Claimant.

The undersigned, John Phillip White, plaintiff herein, hereby consents to the requested allowance of the foregoing claim of lien.

/s/ JOHN PHILLIP WHITE,
Plaintiff.

State of California,
City and County of San Francisco—ss.

J. V. Chambers, being first duly sworn, deposes and says:

I am an officer, to wit, treasurer thereof, of the Industrial Indemnity Company, a corporation, lien claimant, and I make this verification for and on behalf of said lien claimant. The foregoing claim of lien is true and correct, and the sums set forth therein have been paid by Industrial Indemnity Company in the manner and for the reasons set forth in said claim of lien.

/s/ J. V. CHAMBERS.

Subscribed and sworn to before me this 6th day of November, 1950.

[Seal] /s/ ALICE C. MORSE,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed November 6, 1950.

[Title of District Court and Cause.]

MEMORANDUM OPINION AND ORDER

Plaintiff, on behalf of the Mars Metal Company of San Francisco, entered into a contract with the United States for the recovery of scrap metal from the strafing range at Camp Beale near Marysville, California.

While collecting metal, with the assistance of certain off-duty troop personnel employed for the purpose (with the consent of superior officers), plaintiff received serious injuries from the explosion of a dud.[1]

The presence of unexploded shells on the strafing range was a strong possibility. Testimony at the trial, as elicited from the Post Range Officer, indicates that de-dudding operations were considered and recommended but were not undertaken because of the likely expense. Despite the knowledge on the part of both the Range Officer and the Sergeant in charge that danger lurked on the range, neither of them disclosed to plaintiff the degree of caution required in order to accomplish scrap collecting with safety.

When plaintiff entered the strafing range as a business invitee, intent upon collecting as much scrap as possible he was not forewarned of the dangers which he might encounter in accomplishing his work. The record indicates that he was told

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[1]Webster's New International Dictionary, Second Edition: "Dud: A bomb that fails to explode because of a defective fuse."

only that there was a marked dud and that he should beware of it. When he was present on the range with his then financee, the Sergeant accompanying him indicated that the range was safe. Shortly thereafter, plaintiff received his injuries when he dropped a dud one of his employees handed or tossed to him.

Under the Federal Tort Claims Act the United States is subject to the same liability as that of a private individual. 28 USCA 1346(b); United States v. Fotopulos, 180 F. 2d 631. Military personnel in the instant case were negligent within the scope of their employment in failing to maintain the strafing range in a safe condition for one acting as a business invitee. Thus, the Government is liable for damages. Beasley v. United States, 81 F. Supp. 518.

Defendant failed to provide plaintiff with a reasonably safe place in which to perform his contract with the Government. Hinds v. Wheadon, 19 C. 2d 458. Captain Jones, as a result of a survey, recommended a de-dudding operation. This was not done because of expense involved. Defendant's failure to make the area safe is not excused by reason of the potential cost of such an undertaking.

In view of the condition of the strafing range, the defendant had the additional duty of giving ample warning to plaintiff of the dangers likely to be encountered. This is especially so in view of the hidden nature of the explosive materials. Freeman v. Nickerson, 77 C.A. 2d 40.

Defendant not only failed to give sufficient warn-

ing to plaintiff, but also failed to make a careful inspection itself in order to locate the dangers which might be encountered. Plaintiff was not adequately informed by defendant as to conditions on the range. Actually, he was misled by the incomplete data furnished him by defendant's employees. Humphrey v. Star Petroleum Co., 110 C.A. 15.

Under the circumstances of plaintiff's contract with the Government, defendant had a duty of care commensurably high with the extreme danger involved. Rudd v. Byrnes, 156 Cal. 636. Neither expense nor manpower should have been spared to de-dud the area in question in view of the Government's determination to dispose of the range's scrap contents for profit.

The fact that soldiers employed by plaintiff, himself, participated in the scrap collecting and that one of them handed or tossed the fatal dud to plaintiff is immaterial so far as freeing defendant from liability. Such conduct on the part of the military personnel did not give rise to the status of an intervening cause so as to cut off defendant's liability. The conduct in question was usual and expected under the circumstances and merely made possible the explosion caused by defendant's own negligence in failing to clear the range or, in the alternative, safely marking it for those engaged in collecting scrap. Rae v. California Equipment Co., 12 C. 2d 563. Cf. Stewart v. United States, 186 F. 2d 627.

Defendant argues that plaintiff is barred from recovery by reason of having assumed the risk of

his undertaking. Such is not the law. The fact that plaintiff, as an independent contractor, sought to collect scrap metal from the strafing range, does not absolve defendant from the duty of care which a landowner has toward a business invitee. Plaintiff entered the premises in the latter capacity, despite the role he performed as an independent contractor in recovering metal which he purchased from the Government. It is, of course, true that there is no duty on the part of a defendant to warn an independent contractor of ordinary dangers incident to the type of work to be performed (Louisville v. Newland, 195 S.W. (Ky.) 415), but "duds" on defendant's premises do not fall within the orbit of ordinary dangers.

As previously stated, defendant, as landowner, owed plaintiff, as business invitee, a duty of disclosing the fact that unknown hazards existed on the strafing range. Plaintiff did not assume the risk of such unknown dangers when he engaged in his business of collecting scrap metals.

The Court is unable to agree with defendant that plaintiff assumed the risk of this particular explosion. The evidence fails to establish plaintiff's familiarity with explosives such as those encountered or likely to be encountered on the artillery range. His own training during the war was in demolition work in which he participated in the destruction or removal of buildings. He was untrained in detonation of artillery shells or duds or in the firing of artillery.

On the Court's motion the case is re-opened on

the issue of damages to the end that medical testimony may be supplied with respect to the present physical condition of the plaintiff herein caused by the injuries suffered. In addition, the Court desires additional evidence and discussion on the matter of the damages proximately flowing from the negligence of the defendant. The time of hearing may be set by the Clerk of the Court convenient to the parties. Prior to the hearing plaintiff to submit to a medical examination by a physician and surgeon appointed and designated by the defendant.

Dated May 4th, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed May 4, 1951.

[Title of District Court and Cause.]

SUPPLEMENTAL CLAIM OF LIEN

To the Honorable, the above-entitled Court, and to defendant United States of America and the United States Attorney:

The undersigned, Industrial Indemnity Company, a corporation, hereby requests the above-entitled Court to determine and allow as a lien the further sum of Two Hundred and Fourteen Dollars and Ten Cents ($214.10) against any judgment which may be made and entered in favor of plaintiff John Phillip White in the above-entitled action.

This request and supplemental claim of lien is

for the reasonable expenses incurred by or on behalf of said plaintiff for medical treatment and hospitalization to cure and relieve him from the effects of the injuries set forth in the First Amended Complaint herein, which said sum was paid by said Industrial Indemnity Company for or on behalf of plaintiff since the filing of the original claim of lien herein on November 6, 1950.

At the time of the accident and injuries set forth in the First Amended Complaint on file herein, plaintiff John Phillip White was acting within the course and scope of his employment by Mars Metal Company, 1200 Minnesota Street, San Francisco, California. At said time plaintiff was covered by a Workman's Compensation Insurance Policy issued by the undersigned to said Mars Metal Company, and said Two Hundred and Fourteen Dollars and Ten Cents ($214.10) was paid for or on behalf of plaintiff by the undersigned pursuant to said Policy.

INDUSTRIAL INDEMNITY COMPANY,

By /s/ J. V. CHAMBERS,
Lien Claimant.

The undersigned, John Phillip White, plaintiff herein, hereby consents to the requested allowance of the foregoing claim of lien.

/s/ JOHN PHILLIP WHITE,
Plaintiff.

Duly verified.

[Endorsed]: Filed July 11, 1951.

[Title of District Court and Cause.]

SECOND AMENDED COMPLAINT FOR DAMAGES

Now Comes plaintiff and for cause of action against defendant alleges as follows:

I.

This action is brought pursuant to the Federal Tort Claims Act.

II.

At all times herein mentioned, plaintiff was, until July 1, 1950, a resident of the City and County of San Francisco, State of California, which said City and County is located within the Northern District of California, Southern Division. Since July 1, 1950, plaintiff has been and now is a resident of the City of Sausalito, County of Marin, State of California, which said City and County are located within the Northern District of California, Southern Division.

III.

At all times herein mentioned, the United States of America owned and operated an Army base known as Camp Beale, located at Marysville, California.

IV.

At all times herein mentioned, plaintiff was, until on or about May 1, 1949, the employee of Mars Metal Company, a co-partnership, with its place of business located at No. 1200 Minnesota Street, San Francisco, California.

V.

On or about November 18, 1946, said Mars Metal Company entered into a written contract with the United States of America for the collection of metal scrap at Camp Beale, California.

VI.

On November 22, 1946, pursuant to said contract, plaintiff was supervising on behalf of said Mars Metal Company the collection of scrap metal from the strafing range adjacent to Firing Ranges 9 and 10B at Camp Beale, to the knowledge of defendant United States of America, its agents, servants, and employees. At said time and place, the United States of America through its agents, servants and employees, negligently and carelessly permitted unexploded shells to remain on said strafing range and negligently and carelessly failed and neglected to warn plaintiff of the presence of the same.

VII.

As a result of said negligence and carelessness, plaintiff discarded what appeared to be a non-explosive shell, and the same thereupon exploded in his immediate presence, fragments thereof penetrating both of plaintiff's feet and legs, and causing the following injuries:

(a) A compound, comminuted fracture, with loss of bone, of the shaft of the right first metatarsal;

(b) Fracture of the head and neck of the right fibula;

(c) Severance of the tendons of the right great toe;

(d) Multiple wounds of both lower extremities;

(e) Limitation of motion in the left ankle;

(f) Multiple shrapnel fragments in both lower extremities;

(g) Recurrent trophic ulceration of the bottom of the left foot;

(h) Injury to the nerves, muscles, and tendons in both feet and legs;

(i) Severe nervous shock, pain and suffering.

VIII.

For some time prior to said accident, plaintiff was employed as a metal salesman, and his earnings from said employment were approximately Two Hundred and Fifty Dollars ($250.00) per month. As a result of said negligence and carelessness and said injuries, plaintiff was unable to engage in his said employment for a period of seventeen (17) weeks to his damage in the sum of One Thousand Dollars ($1,000.00). Thereafter, plaintiff's earnings from said employment were approximately Four Hundred Dollars ($400.00) per month. Thereafter plaintiff was unable to engage in said employment for a period of fifteen (15) weeks to his further damage in the sum of approximately One Thousand Four Hundred Dollars ($1,400.00). Subsequently, his earnings from said employment were approximately Six Hundred ($600.00) to Seven Hundred Dollars ($700.00) per month. As a result of said negligence and carelessness and said in-

juries, plaintiff lost approximately one-sixth (1/6) to one-seventh (1/7) of his working time for a period of twenty-three (23) months, to his further damage in the sum of approximately Two Thousand Three Hundred Dollars ($2,300.00).

IX.

As a result of said carelessness, negligence, and said injuries, plaintiff required the services of an ambulance from Camp Beale to Mary's Help Hospital, San Francisco, California. The cost of said ambulance was and is the sum of One Hundred and Fifteen Dollars ($115.00), and said sum was and is the reasonable cost and value thereof.

X.

As a result of said negligence and carelessness, and said injuries, plaintiff was compelled to engage the services of physicians and surgeons. The cost of said services of said physicians and surgeons was and is the sum of $946.93, and said sum was and is the reasonable cost and value thereof. As a result of said negligence and carelessness, and said injuries, plaintiff has been compelled to obtain X-rays, drugs, equipment, and hospitalization. The total cost of said X-rays, drugs, equipment, and hospitalization was and is the sum of $2,319.26, and said sum was and is the reasonable cost and value thereof.

XI.

As a result of said carelessness, negligence, and said explosion, plaintiff has sustained permanent

injuries which will require the further services of physicians and surgeons, hospitalization, X-rays, drugs, and equipment, for the duration of plaintiff's life, and as a result thereof, plaintiff will sustain further and additional loss of working time for the remainder of his life.

XII.

By reason of the foregoing facts plaintiff has been damaged in the sum of Sixty-Three Thousand Eight Hundred and Eighty-One Dollars and Nineteen Cents ($63,881.19), no part of which has been paid.

Wherefore, plaintiff prays judgment against defendants in the sum of Sixty-Three Thousand Eight Hundred and Eighty-One Dollars and Nineteen Cents ($63,881.19), together with interest and costs incurred herein, and such other and further relief as this Court may deem just and proper.

/s/ M. S. HUBERMAN,

/s/ LEONARD J. BLOOM,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed July 11, 1951.

In the United States District Court, Northern District of California, Southern Division

No. 27740-H

JOHN PHILLIP WHITE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER

Plaintiff, following the presentation of additional evidence on the question of damages, has submitted a computation as set forth in his second amended complaint. After reviewing such computation in the light of the evidence, the Court is prepared to make the following findings:

The Court specifically finds in connection with the injuries sustained by the plaintiff that the same are permanent to the extent that he has suffered and will continue to suffer from an open ulcer in the right foot. He has limitations therein which will persist, according to medical testimony undisputed, over the period of his lifetime. In addition, the Court finds that through testimony submitted by the plaintiff through the medium of Dr. Morrissey that the plaintiff will require yearly medical attention and hospitalization. Under the conditions, therefore, prospective amounts should be and properly are allowed as to medical expenses and future pain and suffering.

Accordingly, it is the judgment of the Court that special damages be, and they hereby are, awarded plaintiff in the amount of $8,081.19; general damages be, and they hereby are, awarded plaintiff in the amount of $47,000, or a total of $55,081.19.

Dated August 6, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed August 6, 1951.

[Title of District Court and Cause.]

NOTICE OF MOTION TO REOPEN CAUSE FOR ADMISSION OF DOCUMENT IN EVIDENCE AND FOR ENTRY OF FORMAL ORDER AUTHORIZING FILING OF SECOND AMENDED COMPLAINT

To defendant United States of America and to Chauncey Tramutolo, United States Attorney and Rudolph J. Scholz, Assistant United Attorney:

Please take notice that plaintiff will move the above-entitled Court, in the courtroom of the Honorable George B. Harris, District Judge, Room 276, Post Office Building, San Francisco, California, on October 3, 1951, at the hour of 10 a.m. of said day, or as soon thereafter as counsel may be heard, to reopen the above cause for the purpose of admit-

ting in evidence a certain letter dated September 19, 1951, between the Industrial Indemnity Company, plaintiff John Phillip White, M. S. Huberman, and Leonard J. Bloom, and to make and enter a formal order authorizing the filing of plaintiff's Second Amended Complaint herein.

The reason for the admission in evidence of this letter is to fully inform the Court of the agreement between the plaintiff John Phillip White, the Industrial Indemnity Company, lien claimant, and their attorneys to enable the Court to make and enter a proper judgment in the action. The reason for the formal order respecting the filing of plaintiff's Second Amended Complaint is the fact that the United States Attorney has declined to sign a written stipulation covering the filing of said Second Amended Complaint.

Said motion will be, and is hereby, based on the draft of the proposed order, a true and correct copy of the aforesaid letter dated September 19, 1951, the affidavit of Leonard J. Bloom, the points and authorities on which plaintiff relies, all of which documents are attached hereto, all of the papers and records in the above action, and such oral testimony as may be adduced at the hearing of this motion.

Dated September 24, 1951.

/s/ M. S. HUBERMAN,

/s/ LEONARD J. BLOOM,
Attorney for Plaintiff.

[Endorsed]: Filed Sept. 24, 1951.

AFFIDAVIT OF LEONARD J. BLOOM

State of California,
City and County of San Francisco—ss.

Leonard J. Bloom, being first duly sworn, deposes and says:

I am one of the attorneys for plaintiff John Phillip White and Industrial Indemnity Company, lien claimant, and the facts herein stated are within my knowledge.

On July 11, 1951, plaintiff moved the Court for permission to file his Second Amended Complaint to conform to proof and to cover matters which had occurred subsequent to the filing of the First Amended Complaint. After affiant had so moved the Court, the following proceedings occurred:

The Court: Well, may the answer on file as embodied in that answer on behalf of the United States of America be deemed the answer to the second amended complaint?

Mr. Bloom: Certainly, your Honor.

The Court: Counsel for the Government, the answer on file may be deemed to be the answer to this second amended complaint.

Mr. Scholz: I was going to say, your Honor, that of course we have had no time to plead to it. We just received it. But I don't think the answer on file would cover those other allegations. If your Honor is going to admit that, I would think that the best thing to do would be to stipulate that all the matter contained therein is denied.

Mr. Bloom: That is satisfactory.

The Court: Save and except such items as may have been stipulated to.

Mr. Scholz: That's right, or admitted in the original answer.

The Court: Well, I think you had better file a written stipulation on that.

Mr. Bloom: Very well.

Thereafter, affiant tendered to Rudolph J. Scholz, Assistant United States Attorney, a proposed stipulation in accordance with the above proceeding. On August 23, 1951, the United States Attorney, by and through said Rudolph J. Scholz, advised affiant by letter that the United States Attorney declined to sign the stipulation theretofore tendered.

At said proceeding on July 11, 1951, plaintiff was permitted by the Court to file said Second Amended Complaint, which was then done. In view of the foregoing proceedings on July 11, 1951, and the declination of the United States Attorney to sign the contemplated stipulation, it would appear desirable to reopen the cause for the making and entry of a formal order confirming the fact that the Second Amended Complaint was and has been filed by leave of Court.

In reference to the letter of September 19, 1951, confirming the agreement between plaintiff John Phillip White, the Industrial Indemnity Company, lien claimant, and their attorneys, this letter sets forth the agreement, subject to the Court's approval, between the parties respecting the payment of attorneys' fees. It is deemed desirable to pre-

sent the Court with this understanding so that the Court may have before it information necessary or helpful in the making or preparation of its judgment herein.

/s/ LEONARD J. BLOOM.

Subscribed and sworn to before me this 24th day of September, 1951.

[Seal] /s/ ANNE C. MINIHAN,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires October 17, 1954.

(Copy)

Law Offices
Kennedy & Bloom
57 Post Street
San Francisco 4, California
402 Albert Building
San Rafael, California

September 19, 1951.

Industrial Indemnity Company,
155 Sansome Street,
San Francisco, California.

Re: John Phillip White vs. United States of America, No. 27740 H, Workman's Compensation Policy (Mars Metal Company) No. 546-00829

Gentlemen:

This letter is written to confirm the agreement made prior to the inception of the above litigation

between you, John Phillip White, and us, concerning the conduct of the litigation, responsibility for costs, and payment of legal fees.

It is our understanding that it was agreed that White should prosecute the action in his own name as party plaintiff for the recovery of all of the damages sustained, including medical and other expenses paid and satisfied by the Industrial Indemnity Company pursuant to the above policy, a Workman's Compensation Policy in the usual form theretofore issued to Mars Metal Company and in effect at the time of the accident. It was further agreed that the subrogated interest of the Industrial Indemnity Company in the recovery should be disclosed to the Court and asserted by the filing of appropriate claims of lien showing the full amount expended by the Industrial Indemnity Company under said policy, including any and all temporary disability payments made to White. Such claims of lien, as you know, have been filed in the above proceeding.

It was further agreed that we would act as counsel for both White and the Industrial Indemnity Company in the prosecution and trial of the above action, and in the preparation and filing of the aforesaid claims of lien, and that we would so advise the Court. The Court was so advised at the trial.

It was further agreed that plaintiff White would be responsible for all costs and expenses except as specifically otherwise agreed. During the course of the trial you agreed to pay the witness fees of

White's physician, Dr. Edmund J. Morrissey. In respect to attorneys' fees, it was agreed that we should undertake the case on a contingent fee basis, and that we should receive, subject to the approval of the Court, twenty per cent (20%) of the recovery, said attorneys' fees to be apportioned between you and White in proportion to your respective interests in the recovery.

The total recovery in the action was the sum of $55,081.19. The aggregate amount of the claims of lien filed by the Industrial Indemnity Company was $4,652.64. Subject to the Court's approval, the total attorneys' fees on the aforesaid twenty per cent (20%) basis would be $11,016.24, of which $930.53 would be chargeable to you, leaving a net balance due you of $3,722.11.

Very truly yours,

/s/ M. S. HUBERMAN,

/s/ LEONARD J. BLOOM.

We hereby confirm the above agreement:

INDUSTRIAL INDEMNITY COMPANY,

By /s/ Illegible,
Claims Manager.

/s/ JOHN PHILLIP WHITE.

Points and Authorities

(1) The Court has the authority to authorize the filing of amended and supplemental pleadings.

Federal Rules of Civil Procedure, Rule 15.

(2) In proceedings brought under the Federal Tort Claims Act, the Court is empowered to fix and determine attorney's fees.

28 U.S.C.A. Sec. 2678.

Respectfully submitted,

/s/ M. S. HUBERMAN,

/s/ LEONARD J. BLOOM,
Attorneys for Plaintiff.

[Endorsed]: Filed September 24, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that judgment entered against it and in favor of John Phillip White on May 4, 1951.

Dated September 28, 1951.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed October 1, 1951.

[Title of District Court and Cause.]

ORDER REOPENING CAUSE FOR ADMISSION OF LETTER IN EVIDENCE AND AUTHORIZING FILING OF SECOND AMENDED COMPLAINT

The motion of plaintiff for the order of this Court reopening the above-entitled cause for the admission in evidence of a certain letter dated September 19, 1951, between plaintiff John Phillip White, the Industrial Indemnity Company, lien claimant, and their attorneys, and for the making and entry of a formal order of this Court authorizing the filing of plaintiff's Second Amended Complaint, came on regularly before the above Court on October 3, 1951. M. S. Huberman and Leonard J. Bloom appeared as attorneys for plaintiff, and Rudolph J. Scholz, Assistant United States Attorney, appeared as attorney for defendant United States of America. Said motions were thereupon made and argued and the Court being fully advised in the premises, and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed as follows:

(1) That the above-entitled action be, and the same is hereby, reopened.

(2) That the letter dated September 19, 1951, between plaintiff John Phillip White, the Industrial Indemnity Company, lien claimant, and their attorneys be, and the same is hereby admitted in evidence.

(3) That this Court hereby confirms that plaintiff's Second Amended Complaint was filed herein on July 11, 1951, by permission of this Court, and the filing of said Second Amended Complaint is hereby formally ratified and authorized.

(4) That each and every allegation contained in said Second Amended Complaint which does not appear in plaintiff's original Complaint shall be deemed denied by defendant, save and except such matters as may have been stipulated to.

(5) That the memoranda opinions and orders for judgment dated and filed herein on May 4, 1951, and August 6, 1951, be, and they are, hereby reaffirmed and reissued in their entirety.

Dated October 3, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed October 5, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 2nd day of November, 1950, before the Court sitting without a jury, M. S. Huberman, Esq., and Leonard J. Bloom, Esq., appearing as attorneys for plaintiff, and Rudolph J. Scholz, Esq., Assistant United States Attorney, appearing as at-

torney for defendant. Evidence both oral and documentary was introduced and the cause submitted for decision. On May 4, 1951, the Court filed a memorandum opinion and order in favor of plaintiff, and on the Court's motion, re-opened the case for the introduction of further evidence on the issue of damages. Thereafter, on July 11, 1951, further evidence was introduced on the issue of damages, and the cause submitted for decision. This Court now finds the facts and states the conclusions of law as follows:

Findings of Fact

I.

The action was brought pursuant to the Federal Tort Claims Act (28 U.S.C.A., Sec. 1346(b)). At all times mentioned in the Second Amended Complaint, plaintiff John Phillip White has been, and now is, a resident of the Northern District of California, Southern Division. The accident set forth in said Second Amended Complaint occurred on November 22, 1946, at Camp Beale, Marysville, California, which is located within the Northern District of California, Southern Division. The matter in controversy, or the claim of plaintiff against defendant, exclusive of interest and costs, exceeds the sum of One Thousand Dollars ($1,000.00).

II.

At all times mentioned in these findings of fact, defendant United States of America owned and operated an army base known as Camp Beale, and located at Marysville, California.

III.

On November 22, 1946, and for several months prior thereto, plaintiff John Phillip White was an employee of Mars Metal Company, a co-partnership, with its place of business located at No. 1200 Minnesota Street, San Francisco, California.

IV.

On October 16, 1946, the War Department extended an invitation to all those interested in bidding on the purchase and recovery of spent bullet metal on the firing ranges at Camp Beale. The Government invited all bidders to inspect the property prior to the submission of bids. Pursuant to this invitation, plaintiff John Phillip White, on behalf of said Mars Metal Company, visited Camp Beale in September and October of 1946. Thereafter, on November 18, 1946, the Government, through Captain Charles D. Pitrie, acting within the scope of his employment by defendant United States of America, accepted the bid of Mars Metal Company. The contract provided for the sale to Mars Metal Company of nonferrous scrap metal at a specific price and included the right to gather all nonferrous metals on firing ranges from firing line to point at which unstopped bullets might fall.

V.

On November 22, 1946, plaintiff John Phillip White was collecting scrap metal, pursuant to said contract between the United States of America and Mars Metal Company, and as an employee of Mars

Metal Company, on the strafing range adjacent to firing ranges 9 and 10B at Camp Beale, with the assistance of certain off-duty troop personnel employed for the purpose with the consent of their superior officers. While so engaged, plaintiff John Phillip White received the injuries hereinafter described from the explosion of a dud.

VI.

At the time of John Phillip White's entry on said strafing range, and prior thereto, and at the time of said accident, the United States of America had knowledge that the presence of unexploded shells or duds on said strafing range was a strong possibility. In October of 1946, Captain Robert Sumner Jones, the post range officer, acting within the scope of his employment by defendant United States of America, conducted a survey of the Camp Beale firing ranges, including said strafing range. On the basis of this survey, Captain Jones, acting within the scope of said employment, recommended that dedudding operations be undertaken because of the presence of unexploded shells. This recommendation was rejected because of the expense involved.

VII.

On November 22, 1946, and prior thereto, the United States of America knew that the presence of unexploded shells, or duds, on said strafing range was an extra hazardous condition, or condition of extreme danger, to any person entering thereon, in that the slightest disturbance or vibration of the same was likely to explode such duds.

VIII.

The United States of America failed to provide plaintiff John Phillip White with a reasonably safe place in which to perform the work under the said contract between the United States of America and Mars Metal Company. As aforesaid, Captain Jones, the post range officer, had made a survey of said strafing range showing the presence of unexploded shells or duds and had recommended that the Government undertake dedudding operations, but this recommendation was rejected because of the expense involved. Said strafing range at the time of said accident was grass covered, and visual inspection alone could not detect the presence of hidden duds. Electrical or other scientific detecting devices were available and known to the United States of America at the time of the accident, but were not used by the United States of America because of the expense thereof.

IX.

Defendant United States of America failed and neglected to warn plaintiff John Phillip White, prior to said accident, of the danger, known to the United States of Ameirca, of the likelihood of his encountering unexploded shells or duds on the said strafing range. Defendant United States of America failed and neglected to warn plaintiff John Phillip White, prior to said accident, that mere ground vibration caused by walking near an unexploded shell or dud might detonate the same. Defendant United States of America failed and neg-

lected to warn plaintiff John Phillip White, prior to said accident, that a survey made by the post range officer immediately prior to the accident disclosed that said strafing range was in an extremely hazardous condition because of the presence of unexploded shells or duds thereon. Defendant United States of America failed and neglected to explain to plaintiff John Phillip White, prior to said accident, that there had been no use of any scientific electrical or mechanical equipment to locate unexploded shells or duds on said strafing range prior to the entry of plaintiff thereon.

X.

Defendant United States of America actually represented to plaintiff John Phillip White that said strafing range was a safe area on which to perform his work. The Sergeant in charge of said strafing range, under said post range officer, acting within the scope of his employment by defendant United States of America, told plaintiff John Phillip White prior to his entry on said strafing range that the same was in a safe condition except for a certain marked dud which he specifically pointed out to plaintiff. Said Sergeant told plaintiff John Phillip White, prior to his entry on said strafing range, that the range had not been used for approximately two years. Further, he showed plaintiff a solid iron 37 millimeter non-explosive anti-tank projectile, and advised him that he was likely to find many of them on the strafing range.

The projectile which caused the explosion in question was closely similar in appearance to one of these solid iron projectiles, whereas, in actual fact, it was a 37 millimeter anti-personnel projectile with an explosive warhead. Said Sergeant knew that army personnel was assisting plaintiff John Phillip White immediately prior to said explosion, but said Sergeant gave no warning to plaintiff other than to admonish him to instruct said personnel to stay away from the marked dud.

XI.

On November 22, 1946, plaintiff John Phillip White and his helpers were engaged in picking up or collecting cartridges from said strafing range. While so engaged, one of plaintiff's helpers, Private Lang, one of the aforesaid off-duty Camp Beale army personnel, picked up what appeared to be one of said solid iron 37 millimeter anti-tank projectiles and asked plaintiff whether he was interested in the same. Plaintiff replied in the negative, and almost simultaneously, Private Lang pitched or handed the projectile to plaintiff, who dropped the same. The projectile was in plaintiff's hand but a fraction of a second. He did not have time to grasp the projectile or inspect it. Upon hitting the ground, said projectile exploded, causing injury to Private Lang and the injuries to plaintiff hereinafter described. The projectile which exploded was apparently a 37 millimeter anti-personnel projectile with an explosive warhead similar in appearance to a non-explosive 37 milli-

meter iron anti-tank projectile. The act of Private Lang of picking up, and handing or tossing the said projectile to plaintiff John Phillip White was a normal and natural act incident to the collection of scrap metal from said strafing range and was foreseeable by defendant United States of America. Said conduct on the part of Private Lang did not in any way constitute an intervening cause relieving defendant United States of America of liability to plaintiff John Phillip White for the injuries sustained by him as a result of said explosion.

XII.

The conduct of defendant United States of America, acting by and through its servants, agents, and employees within the scope of their employment, in permitting plaintiff John Phillip White to enter upon and work on said strafing range on November 22, 1946, constituted, under the circumstances hereinabove set forth, negligence on the part of defendant United States of America to plaintiff John Phillip White, and said negligence was the direct, natural, foreseeable, and proximate cause of the said explosion and of the injuries, hereinafter described, sustained by plaintiff John Phillip White.

XIII.

All of the aforesaid acts of negligence, misrepresentation, and neglect by defendant United States of America proximately causing said explosion, as aforesaid, were acts of negligence, misrepresentation, and neglect by agents, servants, and

employees of defendant United States of America acting within the course and scope of their employment.

XIV.

Plaintiff John Phillip White had no familiarity with explosives such as those encountered or likely to be encountered on said strafing range. He was untrained in detonation of artillery shells or duds or in the firing of artillery. The only prior demolition training received by plaintiff in his war service was confined to the destruction or removal of buildings. There was no basis for any assumption by defendant United States of America that plaintiff John Phillip White was experienced or trained in the detection or decontamination of artillery shells or duds. Plaintiff John Phillip White did not assume the risk of the aforesaid explosion. Said explosion and the injuries and damages sustained by plaintiff John Phillip White were not due to or caused by an unavoidable accident. Plaintiff John Phillip White was not guilty of carelessness or negligence proximately contributing to said explosion and said injuries sustained by him, and there was no contributory negligence by plaintiff John Phillip White. The conditions complained of in plaintiff's Second Amended Complaint were not open, patent, or obvious conditions and were not known to plaintiff John Phillip White.

XV.

As a result of the aforesaid explosion, metallic fragments penetrated both of plaintiff's feet and legs, causing the following injuries:

(a) A compound, comminuted fracture, with loss of bone, of the shaft of the right first metatarsal;

(b) Fracture of the head and neck of the right fibula;

(c) Severance of the tendons of the right great toe;

(d) Multiple wounds of both lower extremities;

(e) Limitation of motion in the left ankle;

(f) Multiple shrapnel fragments in both lower extremities;

(g) Recurrent trophic ulceration of the bottom of the left foot;

(h) Injury to the nerves, muscles, and tendons in both feet and legs;

(i) Severe nervous shock, pain and suffering.

As a result of said injuries, plaintiff has sustained intense pain and suffering, continuously from the date of said explosion, and will continue to suffer the same for the remainder of his natural life. Said pain and suffering has been, and will be, acute, upon the recurrent flaring up of the ulcer of the left foot, which condition will persist for the remainder of plaintiff's life. The aforesaid permanent injuries interfere with and impede plaintiff's usual and normal physical activities in the pursuit of his business and recreational affairs, and such condition will continue for the remainder of plaintiff's life.

XVI.

For some time prior to said accident, plaintiff was employed as a metal salesman, and his earn-

ings from said employment were approximately Two Hundred and Fifty Dollars ($250.00) per month. As a result of said negligence and carelessness and said injuries, plaintiff was unable to engage in his said employment for a period of seventeen (17) weeks to his damage in the sum of One Thousand Dollars ($1,000.00). Thereafter, plaintiff's earnings from said employment were approximately Four Hundred Dollars ($400.00) per month. Thereafter plaintiff was unable to engage in said employment for a period of fifteen (15) weeks to his further damage in the sum of approximately One Thousand Four Hundred Dollars ($1,400.00). Subsequently, his earnings from said employment were approximately Six Hundred Dollars ($600.00) to Seven Hundred Dollars ($700.00) per month. As a result of said negligence and carelessness and said injuries, plaintiff lost approximately one-sixth (1/6) to one-seventh (1/7) of his working time for a period of Twenty-three (23) months, to his further damage in the sum of approximately Two Thousand Three Hundred Dollars ($2,300.00).

XVII.

As a result of said carelessness, negligence, and said injuries, plaintiff required the services of an ambulance from Camp Beale to Mary's Help Hospital, San Francisco, California.

XVIII.

As a result of said negligence and carelessness, and said injuries, plaintiff was compelled to engage

the services of physicians and surgeons. As a result of said negligence and carelessness, and said injuries, plaintiff has been compelled to obtain X-rays, drugs, equipment, and hospitalization. The total cost of said ambulance, services of physicians and surgeons, X-rays, drugs, equipment and hospitalization was and is the sum of Three Thousand Three Hundred Eighty-one Dollars and Nineteen Cents ($3,381.19), and said sum was and is the reasonable cost and value thereof.

XIX.

Plaintiff John Phillip White was born on January 22, 1911. His life expectancy on the date of said accident, to wit, November 22, 1946, was and is 34.36 years, and his life expectancy on the last day of the trial of this action, to wit, July 11, 1951, was and is 30.03 years. As a result of said carelessness, negligence, and said explosion, plaintiff John Phillip White has sustained permanent injuries which will require the further services of physicians and surgeons, hospitalization, X-rays, drugs, and equipment, for the duration of his natural life, and as a result thereof, plaintiff John Phillip White will also sustain further and additional loss of working time for the remainder of his life.

XX.

By reason of said carelessness and negligence of defendant United States of America, and said explosion, plaintiff John Phillip White sustained special damages, as aforesaid, in the total sum of Eight

Thousand Eighty-one Dollars and Nineteen Cents ($8,081.19), and general damages in the sum of Forty-seven Thousand Dollars ($47,000.00).

XXI.

On November 6, 1950, with leave of Court, the Industrial Indemnity Company, a corporation, filed herein its Claim of Lien. On July 11, 1951, said Industrial Indemnity Company, with leave of Court, filed herein its Supplemental Claim of Lien. At the time of said explosion, plaintiff John Phillip White was covered by a Workman's Compensation Insurance Policy issued by said Industrial Indemnity Company to said Mars Metal Company. Pursuant to said Policy, said Industrial Indemnity Company expended the sum of Three Thousand Three Hundred and Eight-one Dollars and Nineteen Cents ($3,381.19) for medical treatment and hospitalization to cure and relieve plaintiff John Phillip White from the effects of the injuries sustained by him, as aforesaid. Said expenditures were and are reasonable and necessary. Pursuant to said policy, said Industrial Indemnity Company paid to plaintiff John Phillip White temporary disability payments in the total sum of One Thousand Two Hundred Seventy-one Dollars and Forty-five Cents ($1,271.45) for or on account of the injuries sustained by him in said explosion. Said Industrial Indemnity Company has a lien against any judgment awarded herein to plaintiff John Phillip White in the total sum of Four Thousand Six Hundred and Fifty-two Dollars and Sixty-Four Cents ($4,652.64).

XXII.

M. S. Huberman and Leonard J. Bloom, Attorneys at Law, have been and are the attorneys who represented, and represent, plaintiff John Phillip White and said Industrial Indemnity Company in the presentation of their respective claims, and in the trial of this action. Said attorneys have rendered valuable legal services to plaintiff John Phillip White and said Industrial Indemnity Company, and said services were and are of the reasonable value of twenty per cent (20%) of the total damages of Fifty-five Thousand Eighty-one Dollars and Nineteen Cents ($55,081.19), hereinabove found, or the sum of Eleven Thousand Sixteen Dollars and Twenty-four Cents ($11,016.24).

Conclusions of Law

(1) That this Court has jurisdiction of this cause;

(2) That on November 22, 1946, plaintiff entered upon said strafing range and was engaged as above described at the time of said explosion as a business invitee of defendant United States of America;

(3) That defendant United States of America, through its agents, servants, and employees, acting within the scope of their employment, negligently and carelessly permitted unexploded shells or duds to remain on said strafing range, and negligently and carelessly failed and neglected to warn plaintiff John Phillip White of the presence of the same;

(4) That said negligence and carelessness of defendant United States of America was the proximate cause of the explosion and injuries sustained by plaintiff John Phillip White;

(5) That defendant United States of America is liable to plaintiff John Phillip White for the aforesaid injuries sustained by him by reason of the breach by defendant United States of America, and by its agents, servants and employees acting within the scope of their employment, of the following duties owed to plaintiff John Phillip White under the laws of the State of California as of the time of said explosion:

(a) The duty to provide plaintiff John Phillip White with a reasonably safe place for him, as a business invitee, to perform the work under said contract;

(b) The duty to warn plaintiff John Phillip White, as a business invitee, of the hidden danger from unexploded shells or duds likely to be encountered on said strafing range;

(c) The duty of defendant United States of America to make a proper or necessary inspection of said strafing range prior to the entry of plaintiff John Phillip White thereon for the purpose of ascertaining its condition and locating hidden or latent danger;

(d) The duty of defendant United States of America to correct or eliminate the known hazardous condition of said strafing range prior to

permitting plaintiff John Phillip White, a business invitee, to enter and work thereon;

(6) That defendant United States of America owed to plaintiff John Phillip White under the laws of the State of California a high degree of care commensurate with the extreme hazard or danger to life and limb arising from the presence of high explosives on said strafing range;

(7) That defendant United States of America is liable to plaintiff John Phillip White for damages for the injuries sustained by him under the laws of the State of California by reason of the misrepresentation by defendant United States of America, through its agents, servants and employees, acting within the scope of their employment, to plaintiff John Phillip White, a business invitee, that the said strafing range was a safe place for him to perform the work under said contract;

(8) That the said negligence of defendant United States of America was the direct and proximate cause of said explosion and of said injuries to plaintiff John Phillip White, and there was no intervening cause relieving defendant United States of America from its liability to plaintiff John Phillip White for said injuries;

(9) That said explosion and the injuries and damages sustained by plaintiff John Phillip White were not due to or caused by an unavoidable accident, nor did plaintiff John Phillip White assume the risk of such an explosion;

(10) That plaintiff John Phillip White was not guilty of carelessness or negligence proximately contributing to said explosion and said injuries sustained by him, and that there was no contributory negligence by plaintiff John Phillip White;

(11) That plaintiff John Phillip White recover from defendant United States of America special damages in the sum of Eight Thousand Eighty-one Dollars and Nineteen Cents ($8,081.19), and general damages in the sum of Forty-seven Thousand Dollars ($47,000.00), or total damages in the sum of Fifty-five Thousand Eighty-one Dollars and Nineteen Cents ($55,081.19);

(12) That of said total sum of Fifty-five Thousand Eighty-one Dollars and Nineteen Cents ($55,081.19), the sum of Four Thousand Six Hundred and Fifty-two Dollars and Sixty-four Cents ($4,652.64), less attorneys' fees in the sum of Nine Hundred Thirty Dollars and Fifty-three Cents ($930.53), or a net balance of Three Thousand Seven Hundred and Twenty-two Dollars and Eleven Cents ($3,722.11), be paid to the Industrial Indemnity Company, a corporation, in satisfaction of its said lien; that twenty per cent (20%) of said Fifty-five Thousand Eightly-one Dollars and Nineteen Cents ($55,081.19), or the sum of Eleven Thousand Sixteen Dollars and Twenty-four Cents ($11,016.24) be paid to M. S. Huberman and Leonard J. Bloom as and for attorneys' services rendered by them herein; and that the balance be paid to plaintiff John Phillip White.

Judgment is hereby ordered to be entered accordingly.

Dated this 18th day of Oct., 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

Receipt of copy acknowledged.

Lodged October 5, 1951.

[Endorsed]: Filed October 13, 1951.

In the United States District Court, Northern District of California, Southern Division

No. 27740 H

JOHN PHILLIP WHITE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial before the Court, sitting without a jury, and the evidence adduced by the parties having been heard, and the cause submitted for decision, the Court made its findings of fact and conclusions of law.

A claim of lien and a supplemental claim of lien in the total sum of Four Thousand Six Hundred

and Fifty-two Dollars and Sixty-four Cents ($4,652.64) have heretofore been filed herein by the Industrial Indemnity Company, a corporation. Plaintiff John Phillip White, said Industrial Indemnity Company, and their attorneys, M. S. Huberman and Leonard J. Bloom, have introduced in evidence and filed herein a letter dated September 19, 1951, ratifying and confirming, subject to the approval of this Court, the understanding and agreement among them, from the commencement of this action, covering the conduct of this litigation and their respective interests in any award which this Court might make and enter. From said letter dated September 19, 1951, said claim of lien and said supplemental claim of lien, and from the evidence and stipulations adduced during the trial of this action, it appears, and the Court finds, that said M. S. Huberman and Leonard J. Bloom have represented both plaintiff John Phillip White and said Industrial Indemnity Company in this action from the inception thereof; that said attorneys filed said claim of lien and supplemental claim of lien on behalf of said Industrial Indemnity Company with the consent and permission of plaintiff John Phillip White; that to the extent of the aggregate amount of said claims of lien, to wit, Four Thousand Six Hundred Fifty-two Dollars and Sixty-four Cents ($4,652.64), said Industrial Indemnity Company has a lien by subrogation against any judgment herein, less its rateable share of attorney's fees; that said Industrial Indemnity Company to the extent of its said subrogated claims,

has been, and now is, considered herein as being in the same position as a formal party plaintiff from the inception of this action; and that, under the provisions of said letter dated September 19, 1951, plaintiff John Phillip White and said Industrial Indemnity Company have agreed, subject to the approval of this Court, that the attorney's fees payable herein shall be rateably shared by them in proportion to their respective shares of the award made herein.

It Is Therefore Ordered, Adjudged, and Decreed as follows:

(1) That plaintiff John Phillip White do have and recover of and from defendant United States of America special damages in the sum of Eight Thousand Eighty-one Dollars and Nineteen Cents ($8,081.19), and general damages in the sum of Forty-seven Thousand Dollars ($47,000.00), or total damages in the sum of Fifty-five Thousand Eighty-one Dollars and Nineteen Cents ($55,-081.19), with interest thereon at the legal rate from the date hereof until paid, together with his costs taxed in the sum of $255.45.

(2) That defendant United States of America pay the said Fifty-five Thousand Eighty-one Dollars and Ninteen Cents ($55,081.19) to the following persons and in the following manner:

(a) To the Industrial Indemnity Company of San Francisco, California, the sum of Three Thousand Seven Hundred and Twenty-two Dollars and Eleven Cents ($3,722.11), which said sum rep-

resents the aggregate amount of their subrogated claims of lien in the amount of Four Thousand Six Hundred and Fifty-two Dollars and Sixty-four Cents ($4,652.64), less its rateable share of attorney's fees in the sum of Nine Hundred and Thirty Dollars and Fifty-three Cents ($930.53);

(b) To M. S. Huberman and Leonard J. Bloom, 57 Post Street, San Francisco, California, the sum of Eleven Thousand Sixteen Dollars and Twenty-four Cents ($11,016.24), which represents attorney's fees of twenty per cent (20%) of the total award of Fifty-five Thousand Eighty-one Dollars and Nineteen Cents ($55,081.19);

(c) To plaintiff John Phillip White, of Sausalito, California, the sum of Forty Thousand Three Hundred and Forty-two Dollars and Eighty-four Cents ($40,342.84), which represents the balance of said award after the payment of said subrogated claims of lien and said attorney's fees, together with the aforesaid legal interest and costs.

Dated October 30, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

Approved as to form, as provided in Rule 5 (d):

/s/ M. S. HUBERMAN,

/s/ LEONARD J. BLOOM,
Attorneys for Plaintiff John Phillip White and Said Industrial Indemnity Company, Lien Claimant.

Approved as to form, as provided in Rule 5 (d):

CHAUNCEY TRAMUTOLO,
United States Attorney.

RUDOLPH J. SCHOLZ,
Asst. United States Attorney.

By /s/ RUDOLPH J. SCHOLZ,
Attorneys for Defendant,
United States of America.

[Endorsed]: Filed October 30, 1951.

Entered October 31, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that judgment entered against it and in favor of John Phillip White, plaintiff, on October 31, 1951.

Dated November 2, 1951.

CHAUNCEY TRAMUTOLO,
United States Attorney,

By /s/ RUDOLPH J. SCHOLZ,
Assistant United States Attorney, Attorneys for Defendant, United States of America.

[Endorsed]: Filed November 2, 1951.

[Title of District Court and Cause.]

MOTION AND NOTICE OF MOTION

The defendant, United States of America, moves the above-entitled Court for its order reopening the above-entitled action for admission in evidence of interrogatories and the answers thereto propounded by the plaintiff herein, and allied matters or the signed copies of the same. Said motion will be based upon all the papers, records and files in this action, including the Court Reporter's notes, and upon the ground that at the time of the trial the interrogatories had been misplaced and due search failed to locate them; that the same are material to this action.

Said motion will be made the 26th day of November, 1951, at 10:00 o'clock a.m. before the Honorable George B. Harris, in his Courtroom, No. 276, Post Office and Courthouse Building, Seventh and Mission Streets, San Francisco, California.

CHAUNCEY TRAMUTOLO,
United States Attorney,

/s/ RUDOLPH J. SCHOLZ,
Assistant United States Attorney, Attorneys for Defendant.

Authority
Federal Rules of Civil Procedure 60(b).

[Endorsed]: Filed November 19, 1951.

[Title of District Court and Cause.]

MOTION AND NOTICE OF MOTION

The defendant, United States of America, moves the above-entitled Court for its order amending the notice of appeal heretofore filed in this Court on October 1, 1951, by striking out the words therein "May 4, 1951" and substituting therein "August 6, 1951." Said motion will be based upon this notice, all the papers, records and files of this action and upon the grounds that through inadvertence or excusable error or neglect that the words and figures therein of "May 4, 1951" was inserted instead of "August 6, 1951" in said notice.

Said motion will be made before the above-entitled Court, Honorable George B. Harris presiding on 30th day of November, 1951, at the hour of 10:00 o'clock a.m. thereof.

CHAUNCEY TRAMUTOLO,
United States Attorney.

RUDOLPH J. SCHOLZ,
Assistant United States Attorney, Attorneys for Defendant.

Authority
Federal Rules of Civil Procedure 60(b).

[Endorsed]: Filed November 27, 1951.

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 30th day of November, in the year of our Lord one thousand nine hundred and fifty-one.

Present: the Honorable George B. Harris, District Judge.

[Title of Cause.]

ORDER DENYING MOTION TO AMEND NOTICE OF APPEAL

This case came on regularly for hearing on motions to reopen and to amend notice of appeal. Messrs. Leonard J. Bloom and M. S. Huberman were present on behalf of the plaintiff, and Rudolph J. Scholz, Esq., Assistant U. S. Attorney, appeared on behalf of the Government. Mr. Leonard introduced in evidence Plaintiff's Exhibit No. 16 in connection with the motion to reopen. Mr. Scholz introduced in evidence Government's Exhibit I in connection with the motion to reopen. After hearing counsel on said motions it is Ordered that memoranda be filed in five and five days and that this case be continued to December 11, 1951, for submission of the motion to reopen. It is further Ordered that the motion to amend notice of appeal be denied.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION TO RE-OPEN CASE

This matter having been briefed and submitted for ruling,

It Is Ordered that defendant's motion to re-open the above-entitled case be, and the same hereby is, denied.

Dated December 26, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed December 26, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor,

It Is Hereby Ordered that the defendant and appellant herein may have to and including the 25th day of January, 1952, to file the record on appeal in the United States Court of Appeals for the Ninth Circuit.

Dated November 2, 1951.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed November 2, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal as designated by the attorney for the appellant:

Complaint for damages.

Answer to complaint.

Interrogatories propounded by plaintiff.

Stipulation respecting filing of first amended complaint.

First amended complaint for damages.

Motion for production of documents.

Affidavit in support of motion for order to produce documents.

Order for production and inspection of documents.

Claim of lien of Industrial Indemnity Co.

Memorandum opinion and order.

Supplemental claim of lien by Industrial Indemnity Co.

Second amended complaint for damages.

Order fixing damages.

Notice of motion to reopen cause, etc.

Notice of appeal dated September 28, 1951.

Order reopening cause for admission of letter, etc.

Findings of fact and conclusions of law.

Judgment.

Notice of appeal dated November 2, 1951.

Statement of points to be relied upon on appeal.

Motion and notice of motion to reopen cause for admission in evidence of interrogatories, etc.

Motion to amend notice of appeal.

Order denying motion to amend notice of appeal.

Order denying motion to reopen case.

Designation of contents of record on appeal.

Order extending time to docket record on appeal.

Reporter's Transcript, November 2, 3, 1950.

Reporter's Transcript, November 6, 1950.

Reporter's Transcript, July 11, 1951.

Reporter's Transcript, October 3, 1951.

Plaintiff's Exhibits 1 to 16A.

Defendant's Exhibits A to I (B for identification same as Plaintiff's 15).

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 9th day of January, 1952.

[Seal] C. W. CALBREATH,
Clerk,

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13226. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. John Phillip White, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 9, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 13226

UNITED STATES OF AMERICA,
Appellant,

vs.

JOHN PHILLIP WHITE,
Appellee.

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

That the trial Court erred.

(1) in finding that John Phillip White was not guilty of contributory negligence;

(2) in giving plaintiff judgment in view of the fact that there is no proof of any negligence of any employee of the United States or that plaintiff failed to connect any employee of the United States with the alleged negligence;

(3) in finding that the clearing of the alleged dud area was not a discretionary act and hence within the exceptions of the Federal Tort Claims Act;

(4) in failing to find that the plaintiff assumed the risk of his undertaking;

(5) in failing to find that the United States was not under any obligation to keep the premises in a safe condition for licensees;

(6) in finding that the United States was negligent although there is no allegation of negli-

gence as to any particular employee of the United States in the complaint or proven by the evidence;

(7) in failing to find that defendant had no duty to warn plaintiff of danger likely to be encountered by him; that defendant did warn plaintiff of possible danger;

(8) in failing to find that the defendant was not obligated to make a careful or any inspection of the premises in order to locate any danger which the plaintiff might encounter;

(9) in failing to find that plaintiff's own employee was the direct or proximate cause of the damages or that the same was in the nature of an intervening cause;

(10) in failing to find that plaintiff's own employee, a soldier, was the agent of plaintiff and that said soldier was not acting within the scope of his employment;

(11) in failing to find that the United States had no actual knowledge of any duds;

(12) in finding that the Industrial Indemnity Company of San Francisco was entitled to $3,722.11 or any sum whatsoever in this action.

CHAUNCEY TRAMUTOLO,
United States Attorney,

/s/ RUDOLPH J. SCHOLZ,
Assistant United States Attorney, Attorneys for Appellant.

Affidavit of Service by Mail attached.
[Endorsed]: Filed January 21, 1952.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the above-entitled Court:

The appellant, United States of America, by its attorney herein, hereby designates for inclusion in the transcript of record upon appeal, the complete record and all the proceedings and evidence in the action.

Dated January 21, 1952.

CHAUNCEY TRAMUTOLO,
United States Attorney,

/s/ RUDOLPH J. SCHOLZ,
Assistant United States Attorney.

[Endorsed]: Filed January 21, 1952.

No. 13226

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

JOHN PHILLIP WHITE,

Appellee.

Transcript of Record
In Two Volumes
Volume II
(Pages 93 to 355)

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 13226

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

JOHN PHILLIP WHITE,

Appellee.

Transcript of Record
In Two Volumes
Volume II
(Pages 93 to 355)

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

In the Southern Division of the United States District Court for the Northern District of California

No. 27740

Before: Hon. George B. Harris, Judge.

JOHN PHILLIP WHITE,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

REPORTER'S TRANSCRIPT

November 2, 1950

Appearances:

For the Plaintiff:

LEONARD J. BLOOM, ESQ., and
M. S. HUBERMAN, ESQ.

For the United States:

RUDOLPH J. SCHOLZ, ESQ.,
Assistant United States Attorney.

The Clerk: John Phillip White vs. The United States of America, on trial.

Mr. Bloom: Ready. If your Honor please, a brief statement may be of some assistance to the Court, and with your permission I would like to say a few preliminary words. My name is Leonard Bloom. I am of counsel for the plaintiff and this is my associate, Mr. Huberman.

This is an action, if your Honor please, brought under the Federal Tort Claims Act. The first amended complaint which is on file sets forth that this accident occurred on November 18 of the year 1946 at an Army installation, Camp Beale near Marysville, California. It also sets forth the plaintiff, John Phillip White, at the time of this accident, was an employee of a copartnership known as the Mars Metal Company, that the Mars Metal Company had entered into a contract with the United States Government through the Quartermaster Corps of the Army for the purchase of scrap metal at Camp Beale. The contract, which, of course, will be offered in evidence, is a simple contract on the government form for the purchase of metal at a stipulated price. The invitation to bid and the acceptance, in accordance with the government practice, are all contained in the one document. The contract—and I think this is of considerable importance—was for the purchase of bullet metals embedded in target butts at Camp Beale, California, and the contract went on to say that this did include the right to [2*] gather all non-ferrous metals on ranges from firing line to points at which unstocked bullets might fall, to be paid for at contract price, for bullet metals.

And then in the attached additional provisions, with the term "alternate" Article E provides for the removal of the scrap metal, and says, "The contractor will be required to recover, using his own equipment and personnel without any expense to the Government, and will deliver the same to the

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

Post salvage officer where the metals will be weighed prior to final delivery to the contractor," et cetera.

There is nothing in this contract about any assumption of risks or warnings to the personnel or to the contracting parties, unlike a revised government form which now so provides. In any event, the plaintiff White was an employee of the copartnership. He went up there to Camp Beale. He went on the strafing range. That is the range used by aircraft to practice against targets known as a strafing range, and with the permission of the Army he had the assistance of three army men who were off duty and who were paid by the contractor who assisted him in the collection of this nonferrous metal. And while so engaged, one of these army men—I believe he was a sergeant off duty—picked up the projectile in question, which was a dud, unexploded, that is, and tossed or handed it to White, who in turn discarded the same, and it exploded, inflicting these grievous injuries on him. [3]

The accident occurred in 1946. Up to date Mr. White has suffered some six or eight operations on his feet. There were fractures of the leg. A lot of shrapnel was embedded in both feet, and most unfortunately, this condition has remained and has continued to bother him at the present time. He is now suffering from trophic ulceration, nerve injuries as a result of this accident.

That, in brief, I think, your Honor, is the plaintiff's case. Of course, we will also show, I believe, in addition to the contractual——

The Court: What, if any, events, preceded his

entry onto the strafing range? Any conversation?

Mr. Bloom: Yes, there will be evidence, if your Honor please, about how he was permitted to go out on the range, and what, if anything, was told to him, and what the government did or did not do to render this area safe.

The Court: All right.

Mr. Scholz: Would your Honor like to have a statement from me?

The Court: Yes.

Mr. Scholz: If your Honor please, the position of the Government in this case is threefold: First of all, that there is no cause of action stated by the complaint; secondly, the plaintiff himself was negligent; and thirdly, that the plaintiff accepted appreciative risks and hence can not recover. [4]

This accident happened at Camp Beale, near Marysville. I think your Honor probably is familiar with the general location. It is a government reservation consisting in part of land owned in fee by the Government and part leased. We have several ranges up there for small arms, large caliber and a strafing range mentioned by Mr. Bloom. That was all grazing land, and it was leased by the Real Estate Department of the Engineers of the United States Army under a certain clause which I do not think is pertinent here, but by which the Army or the Government was safeguarded in the event they returned it to the lessors. The contract was entered into with the Mars Metal Company, and as I understand—I am not definitely sure, but I think that Mr. White was employed by them on a con-

tingent basis of some sort. That is not particularly material. However, he was with the Mars Metal Company and he went up there to the range and he met Captain Jones, who sits at my right here, who at that time was the post operating officer and also the post range officer. Captain White discussed the situation with him and informed him——

The Court: Captain White?

Mr. Scholz: I mean Captain Jones. I beg your Honor's pardon. Captain Jones discussed the situation with him and told him of the fact there was a firing range, which he knew because that was the contract itself, and that there were duds there. [5]

The Court: And that there were duds there?

Mr. Scholz: And that there were duds there, and also Mr. White said he was familiar with demolitions, because he was in the Seabees on Saipan. I did not meet Mr. White there, but I happened to be there, too. Therefore, in the first place, your Honor, the Government was under no obligation there. In the second place, because he knew what he was going into.

In the second place, we will show that he picked up this shell, or it was handed to him, rather, by unauthorized employees of White, and White threw it down and it exploded, and White, being familiar with demolitions—at lease that was his statement—being with the Seabees in Saipan, had full knowledge of it, and therefore the Government is not liable in this case.

Mr. Bloom: Mr. White, please.

JOHN PHILLIP WHITE

the plaintiff herein, was called as a witness on his own behalf, and being first duly sworn, testified as follows:

The Clerk: Please state your name, your address and your occupation to the Court.

A. John Phillip White, 4 Third Street, Sausalito, California.

Direct Examination

By Mr. Bloom:

Q. Mr. White, you are the plaintiff in this matter, are you not? A. Yes. [6]

Q. In the year 1946, in the month of November, and for several months prior to that time, you were employed by the Mars Metal Company, were you not? A. I was.

Q. What kind of a concern was that organization?

A. The Mars Metal Company was and is a concern for the collection, the purchase of scrap metal, and the processing of them.

Q. What was your function or position with that concern?

A. I was a salesman of the finished products of the Smelter Division. I was also a buyer for scrap metals from industries and an investigator of various lots of material offered by the Government.

Q. I show you a War Department invitation bid and acceptance on War Department contract form No. 26 dated November 28, 1946, which bears the signature "John Phillip White, Representative of

(Testimony of John Phillip White.)

Mars Metal Company, Bidder," and I will ask you if that is your signature? A. It is.

Q. Did you, on behalf of the Mars Metal Company, at or around that time submit this bid and negotiate this contract?

A. I submitted the bid and I did the investigation of the camp before the bid was put in. There was no negotiation.

Mr. Bloom: If your Honor please, I offer this in evidence as Plaintiff's first exhibit.

The Court: It may be marked. [7]

(The contract referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 1.)

Q. (By Mr. Bloom): In connection with this contract, Mr. White, when did you first contact the Army or any officer thereof concerning this bid?

A. Some time in September of 1946 I went to the head office of the Salvage Department at the Presidio here.

Q. Whom did you see there and what did you do?

Mr. Scholz: If your Honor please, I will object to that on the ground it is hearsay. It would not be binding on the Government.

Mr. Bloom: It is only preliminary, if your Honor please.

The Court: You may proceed.

The Witness: I do not recall the name of the officer to whom I spoke at the Presidio. However,

(Testimony of John Phillip White.)

I asked him which of the camps had had contracts let for the recovery of bullet metals.

Q. (By Mr. Bloom): And he told you——

A. He told me some that had and some that had not been, and he told me that Camp Beale was the largest of those that had not been let.

Q. What thereafter occurred in connection with this contract?

A. I asked the Presidio office if it was necessary to make any arrangement for me to go to Camp Beale and inspect it. They said no, it wasn't necessary to make any particular [8] arrangements, but they did not know whether that camp had anything that was recoverable or not, that the individual camp salvage officer had not submitted any proposition to them to let such a contract; that if I wished to go up and take a look, and if I thought it was worthwhile that bids would probably be put out.

Q. Did you go up there? A. I did.

Q. When?

A. Some time in September of 1946.

Q. When you went up there, whom did you see?

A. I saw either the commanding officer or the executive officer.

Q. You asked for either the commanding officer or the executive officer?

A. I asked for the commanding officer, but I believe that the commanding officer was not in, and so I spoke to the executive officer.

Q. What was the nature of that conversation?

(Testimony of John Phillip White.)

A. I was told that if I wanted to inspect the ranges, that that was quite all right, that I would be provided with a guide for that purpose, that it had not come to his attention as to whether bids should be let or not for the reclamation of metals there.

Q. Was that all that was said by the executive officer or the officer you referred to? [9]

A. Yes.

Q. Did he call in someone to show you around the ranges?

A. He either called them in or told his aide to have the man call in, and I was supplied with a guide.

Q. And who was that guide, if you recall?

A. A sergeant named Hodges.

Q. Do you know what his position was?

A. I was told that he had been the range sergeant and was still the range sergeant.

Q. Will you tell us what happened with Sgt. Hodges?

A. Sgt. Hodges said—well, "What ranges do you want to see?" I told him I thought I would be primarily interested in the rifle ranges. However, I was not familiar with the whole operation of the camp. I didn't know everything that had been shot there, and so whatever he could do to help me in addition to looking at the rifle ranges would be appreciated.

Mr. Scholz: If your Honor please, I do not want to interrupt the witness, but may it be stipu-

(Testimony of John Phillip White.)

lated my objection goes to all this line of questions?

The Court: Yes. Overruled.

Q. (By Mr. Bloom): Continue.

A. So we made an inspection of certain ranges there.

Q. Will you please tell us what ranges were inspected?

A. We started with the rifle ranges. Then we went to the machine gun ranges, to the pistol ranges. And then I asked [10] Sgt. Hodges if there had been any strafing done at Camp Beale. He said yes, and he showed me the strafing range.

Mr. Bloom: Counsel, I have a diagram on the board here of this area in question, and I am going to ask the witness, for purposes of convenience, to testify concerning the locale from this diagram. If there are any inaccuracies in it or anything that is not exactly the way it should be, of course I am open to correction. I think it is a fairly accurate portrayal of the general area.

Mr. Scholz: I have no objection. I am going to introduce an official map anyway.

Mr. Bloom: Fine.

Q. I show you an area here on this diagram which we call, marked with "Targets," and marked with "Target Finders," and I will ask you if you will show his Honor where the range is on this diagram?

A. The strafing range is that area between targets and target finders.

Q. Does it embrace all of this area generally?

(Testimony of John Phillip White.)

A. Generally, yes.

Q. And there is a gully that divides the strafing range? A. Yes, approximately in half.

Q. Now, you will note that this diagram has been drawn to an approximate scale of 200 feet to the inch, and I will show you a road marked off on the extreme south end of the diagram, and [11] I would like to ask you how you approached and got on this strafing range with Sgt. Hodges at the side you have testified?

A. On my first visit to the camp, we came by this road, this main road down at the bottom of the map, to a pass that was—ran parallel to the anti-tank ranges, and then ran in an irregular method in the direction of the strafing range.

Q. Is this the approximate approach, then that you made? A. Yes.

Q. Were you on foot or did you have some conveyance?

A. I was driven by the sergeant in a jeep.

Q. Can you tell us approximately what the distance is between these targets and these target finders? A. I would say about 600 feet.

Q. That was the area you were interested in?

A. Yes.

Q. Can you tell us approximately your best approximation of what the distance is between the south end of this strafing range and the road from which you made entry?

A. I believe it is approximately a mile.

Q. You talked about examining, I think, a rifle

(Testimony of John Phillip White.)

range, a pistol range, or both, immediately prior to this? A. Yes.

Q. Where were those ranges located? Do they appear on this diagram?

A. No. This area is, I believe, some six miles from the main [12] portion of the camp. The rifle ranges are relatively close to the main portion of the camp, and the machine gun and pistol ranges are closer to the rifle ranges than they are to this.

Q. I see. Then I take it the only other ranges that are anywhere near this strafing range are what are denominated these anti-tank ranges 9 and 10 down below at the extreme south end of the diagram, is that correct?

A. I beg your pardon?

Q. I say the only other ranges adjacent or near the strafing range are these two anti-tank ranges?

A. That is all that I remember.

Q. When you got on the strafing range with Sgt. Hodges, did you have any further conversation with him there? A. You mean on my first visit?

Q. Yes.

A. Yes, we had quite a bit of conversation there.

Q. Did you have any conversation respecting the range? I am now confining myself, of course, to that subject. If so, will you tell us what it was?

A. He told me that this had been used—he told me how long it had been used, how long since it had been used.

Q. What did he say in that regard?

A. As I remember it, the strafing range had

(Testimony of John Phillip White.)

been in use for approximately two years, but it had been more than a year since it has been used at the time that I was there. [13]

Q. Any further conversation?

A. He told me that on that range up there there would be a number of anti-tank projectiles which were solid chunks of iron with a piece of gilding metal around them.

Q. Did you find any of those or did he show you any of those?

A. He was not able to find any on our first examination. He was not able to find any on the strafing range, but he told me he had a number of them at the range office, and he showed them to me at the range office as we left.

Q. I show you a decontaminated shell and I will ask you if you know approximately what kind or type of shell this is?

A. I would say it was a 37 millimeter.

Q. A 37 millimeter shell. When you refer to the solid anti-tank projectile, would you show us what part of the shell you have reference to?

A. The portion from this crimp to the end of it.

Q. Do I understand that the projectiles shown you by Sgt. Hodges consisted of solid pieces of iron? Is that your testimony? A. Yes.

Q. No warhead or explosive——

Mr. Scholz: Maybe I misunderstand the testimony, but I thought he said Sgt. Hodges said he could not find any at that time.

Mr. Bloom: He said he took him back and

(Testimony of John Phillip White.)

showed him some [14] when he got off the range.

Q. These projectiles that he showed you consisted of solid iron pieces, is that correct?

A. Yes.

Q. Without any warhead or explosive matter in them? A. Yes.

Q. Was that the only type of shell that Sgt. Hodges showed you?

A. No. At the range office he also showed me some bits of a small incendiary bomb that they had used at one time.

Q. Was there any conversation about duds or explosives on that strafing range? A. No.

Q. Was there any warning of any kind given to you by Sgt. Hodges with respect to the possibility of duds or explosives on that firing range?

A. Yes.

Q. What was that conversation and when was it?

A. There was a marked projectile which was halfway embedded in the earth. There was a stick with a red rag on it, and Sgt. Hodges told me that it was there. It was a trick, and there was no reason for it to be there that he knew of, but it was there and to stay a safe distance from it.

Q. Will you please go to the diagram and draw an X at the place where this dud was located and called X?

A. I would say it was there (indicating). [15]

Q. Does that correctly represent the approximate location? A. Yes.

(Testimony of John Phillip White.)

Q. Did Sgt. Hodges point out any other duds or any other explosives to you on that range?

A. He didn't point out any others, and I asked him about the possibility of others and he explained to me that a certain procedure had been used where high explosives had been shot which was that whenever high explosives had been shot and the observers did not see it explode, that firing in that direction was stopped, a crew was sent out to locate it, and the projectile, if it were a high explosive, was either decontaminated or immediately marked for decontamination later.

Q. Do you know why Sgt. Hodges referred to this marked dud as a freak?

A. Only inferentially.

Q. Pardon?

A. I say I know it only inferentially.

Q. Did he say why he characterized it a freak?

A. Because that was not an area in which such projectiles would normally fall.

Q. Have you told us everything that was said at this first conversation about any explosives or possible explosives on that strafing range?

A. I think so.

Q. After you left that range with Sgt. Hodges, did you have any [16] conversations with any Army personnel on that occasion?

A. On my first visit there?

Q. Yes. A. I don't believe so.

Q. When was the next visit to Camp Beale by you?

(Testimony of John Phillip White.)

A. I think as a result of that visit—in any event, shortly after my visit, bids were let, proposals were sent. Upon the receipt of the proposal I had made enough of a preliminary examination on my first visit there to know that I wanted to submit a bid. I went up again with the idea of gathering additional information upon which I might base the bid which we would submit.

Q. When was that?

A. That was some time in October.

Q. Whom did you see, if anybody, or talk to?

A. Once again I went to the commanding officer's office and once again I was given Sgt. Hodges to give me such information as I needed.

Q. Did you have any conversation with the executive or commanding officer?

A. I don't think so on that occasion.

Q. Did you examine any ranges with Sgt. Hodges on that occasion?

A. Yes, we examined the same ranges we had examined before. He also took me to an area in which street fighting had been [17] taught and a mock town some miles beyond the strafing range. I was limited in time, but I did get additional information.

Q. Did you have any conversation on this occasion with Sgt. Hodges respecting the condition of the ranges, and in particular the strafing range?

A. I had one specific conversation with the sergeant at that time. I had driven up to take a look at them, and I had my then fiancee with me, and

(Testimony of John Phillip White.)

Sgt. Hodges said it was all right for her to go around in the jeep with us. And so we went around. Having already decided that there was sufficient to justify working it, at the same time I wanted to get a better estimate of how much it would cost to do this range job; so my fiancee was in the jeep when we got onto the strafing range. We got out and I was estimating how many cartridges per square yard, and my fiancee continued to sit in the jeep. I asked her why, and she said it wasn't safe. I considered it safe on the basis of previous conversations with the sergeant, but in order that she might hear it directly from the man who was supposed to be an authority, I asked him if it was safe for her to get out and walk around. The sergeant said it was. And she got out of the jeep and walked around herself.

Q. Now, the area that you walked around with your fiancee—was that the strafing range proper and near the targets and the target finders on this diagram?

A. Yes, with the precaution of staying at least 25 feet away [18] from that marked "dud."

Q. Was there any further conversation pertaining to this subject with Sgt. Hodges on this occasion? A. I don't believe so.

Q. Will you please tell us if you had any conversation with any other officer, executive officer, commanding officer or person of like authority on that occasion at Camp Beale, or was that the end of your conversations?

(Testimony of John Phillip White.)

A. I believe I went back and thanked the executive officer for his courtesy in providing me with Sgt. Hodges, but I had no extended conversation with anyone.

Q. What was the next time you went back to Camp Beale?

A. The day that the bids were to be opened and the awards made.

Q. Do you remember what date that was?

A. I believe it was November 18th at 11:00 o'clock.

Q. Did you have any conversation with Captain Petrie, the contracting officer, or any other person in authority on this subject at that time?

A. Yes, I had a conversation with Captain Petrie. I told him—well, ours was the only bid submitted. Therefore, Captain Petrie said, "Well, you got the job."

Q. Captain Petrie was the purchasing and contracting officer? A. Yes.

Q. He is the same Captain Petrie who appears on Plaintiff's [19] Exhibit 1, is that true?

A. You mean he signed the——

Q. He signed this contract? A. Yes.

Q. What was that conversation with Captain Petrie?

A. That I was going to start work on the strafing range immediately, and while the strafing range was going to be worked, that I was going to make further investigations as to the feasibility of working other ranges.

(Testimony of John Phillip White.)

Q. That is the substance of your conversation?

A. Yes.

Q. Did he give you any warning on any danger in that strafing range? A. No.

Q. Did he talk about duds or the like?

A. On a strafing range?

Q. Yes. A. No.

Q. Or on any other range? A. No.

Q. What happened after the Mars Metal Company's bid was accepted?

A. I was there. I wanted to get to work immediately. It was either 11:00 o'clock or 1:00 o'clock. I am not sure. And I wanted to get to work immediately. It was necessary for me to [20] get sacks for the gathering of these materials. I also had to get some men to do the work, make all the necessary arrangements for transportation, weighing it in with the salvage officer in accordance with the contract, and all of those details. I also had to confer with an officer because the contract calls for the gathering, the operation of this in conformance with any firing schedules.

Q. Did you confer with an officer in respect to that?

A. Yes, I conferred with an officer in respect to that, and also along the lines that I had spoken to Captain Petrie, that I wanted to investigate the feasibility of other ranges. I had not at any time with Sgt. Hodges gone to the actual artillery ranges, and it was my impression that the artillery projectiles were mainly cast iron, and I was not in-

(Testimony of John Phillip White.)

terested in iron, but then I think maybe I don't know everything, so I went to talk to somebody about the possibility of brass on the artillery ranges.

Q. Whom did you talk to?

A. I am not sure what his rank was. I believe he was a captain whom I was directed to as the post range officer, because basically I wanted to have my operations in conformance with any firing schedules they had.

Q. Do you recall now whether that officer was Captain Jones or not?

A. The name is familiar. I think it was.

Q. This gentleman who sits at the counsel table —do you [21] recognize him as the officer you spoke to?

A. I would not swear that he was, but I wouldn't swear that he wasn't either.

Q. What was your conversation with this officer?

A. That having been awarded the contract, that I intended to start work on it, and was there going to be any firing which was going to mean that I would have to suspend operations or that I could only work certain hours.

I also asked about artillery projectiles and such. The gentleman warned me that artillery projectiles —that artillery projectiles are dangerous things to handle, that they are mostly cast iron, and so in the course of the conversation I decided I just don't want to handle any artillery.

Q. Did you so tell him?

A. Yes, I told him that I had every desire to

(Testimony of John Phillip White.)

stay away from everything that was dangerous.

Q. Did you tell him you were going to start operations on the strafing range? A. I did.

Q. Was anything said by this officer in connection with a condition or any danger on the strafing range?

A. I believe that the captain informed me of the marked dud that was on the strafing range with a standard admonition to be careful about the marked dud.

Q. Was anything said about any other explosives or potential [22] danger?

A. On the strafing range?

Q. Yes. A. No.

Q. What did you do thereafter?

A. I went to town and bought tow sacks and I spoke to the executive officer, telling him I was going to have to employ people, and was there any objections to my hiring soldiers on their off time. And the executive officer said no. He could see no objections to the soldiers working on it offtime.

Q. (By Mr. Scholz): Will you tell us who were present, the date and the time of this conversation?

A. The date was the day of the contract award. I don't believe there was anybody else present at the time.

Q. You do not remember who was present?

A. I said I don't believe there was anyone present. The sergeant may have been present with me at the time, but I don't believe there was anyone present there.

(Testimony of John Phillip White.)

Q. And who was this with?

A. The executive officer.

Q. What was his name? A. I don't recall.

Q. (By Mr. Bloom): So what did you do in response to that conversation?

A. I got some MPs who were going to be off. They said yes, [23] they would like to pick up the cartridges.

Q. How many of them did you obtain?

A. I believe I had a total of five.

Q. The first thing, how many did you have?

A. I think there were three the first day.

Q. Was Sgt. Hodges amongst those?

A. Sgt. Hodges had other duties the first day.

Q. Did you go out on the strafing range that day?

A. I believe we did, although we may not have started until the next morning. I am not positive.

Q. Whenever you started, either that day or the next, what time of day did you start to work?

A. About 8:30.

Q. How many men did you have with you?

A. Three.

Q. And they were army men, were they?

A. Yes.

Q. What area did you go out to?

A. Just to the strafing range.

Q. And how did you work that area that day?

A. We worked until around 12:00 o'clock, and then knocked off an hour, and then worked until around 4:00 o'clock.

(Testimony of John Phillip White.)

Q. What was your general procedure in working that range with these army men?

A. We had tow sacks and everybody had a tow sack, and he put [24] a tow sack down in his area and just worked around the tow sack until the tow sack was filled up and then he moved further up the hill, put another tow sack down, and started filling it up.

Q. What were you collecting or picking up?

A. 50 caliber cartridges.

Mr. Scholz: I will stipulate that the larger is a 50 caliber shell and the smaller a 30 caliber shell.

Mr. Bloom: Thank you, counsel. I didn't know what they were.

Mr. Scholz: I fired them.

Q. (By Mr. Bloom): I take it you were picking up the casing, the nonferrous casing that I now show you. A. Yes.

Q. Counsel says this is a 50 caliber casing. Were you picking up casings like that?

A. Mostly, although there were some smaller caliber empty cartridges there.

Q. Resembling perhaps this? A. Yes.

Mr. Bloom: If there is no objection, I would like to have these marked as Plaintiff's Exhibits next in order, 2 and 3.

The Court: So ordered. [25]

(The casings referred to were thereupon received in evidence and marked, respectively, Plaintiff's Exhibits Nos. 2 and 3.)

(Testimony of John Phillip White.)

Mr. Bloom: Also, if there be no objection, I would like to offer this shell as plaintiff's exhibit next in order, No. 4.

The Court: So ordered.

(The shell referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 4.)

The Court: When you say "this shell," counsel, you might identify it. 35 millimeters?

Mr. Bloom: 37 millimeter decontaminated shell.

Q. In other words, as I understand, the only thing you were collecting were brass cartridges, is that right?

A. Not completely. That was 99 per cent of what I was collecting.

Q. What was the 1 per cent?

A. In the strafing there is a certain amount—most of the lead went into the ground. However, there were areas where the range had accumulated little piles of the lead bullets themselves.

Q. But you were not picking up any ferrous materials, is that correct?

A. No, I was not picking up any ferrous material. I didn't want any.

Q. And had you so instructed your helpers? [26]

A. Yes.

Q. Did you tell them you were not interested specifically in any of these anti-tank shells——

Mr. Scholz: I object to that on the ground it is hearsay and not binding on the defendant.

(Testimony of John Phillip White.)

The Court: Overruled.

Q. (By Mr. Bloom): What did you tell them with respect to these solid anti-tank projectiles, if anything? A. I told them I didn't want them.

Mr. Scholz: Same objection.

The Court: Overruled.

A. That I wanted the tow sacks full of brass cartridges.

Q. (By Mr. Bloom): Were you all working close together or did each man have a particular area that you assigned to him?

A. I asked each of the men to line himself up between the target finder and the target and work up the hill.

Q. How far apart were your men?

A. When they were working, they were approximately 200 feet apart.

Q. Where were you in reference to them? Were you also engaged in picking up the material?

A. Yes, and I was sort of following up and cleaning up those that they missed. The cartridges were quite thick. They were missing a number of them, and I was following behind to pick up those that they missed. [27]

Q. When your sacks were filled, what did you do?

A. Tied them with wire. We were going to wait until the truck got there, and then we would have enough sacks of cartridges to load them on a truck. We left the sacks of cartridges just where they were as they were filled.

(Testimony of John Phillip White.)

Q. And that procedure went on all day the first day? A. Yes.

Q. Was Sgt. Hodges out there on the range at any time during that day?

A. He was there for a while either that day or the next day.

Q. And what was the reason for his coming on the range?

A. He was a friendly guy. He was interested in the operation.

Q. He saw the procedure that was being used, did he? A. Yes.

Q. Did he have any comments about the procedure or any other comments in reference to this subject on that occasion?

A. Not only did he ask me if I had warned the people to stay away from that marked dud, but he commented on the fact that I had marked the dud better than it had originally been marked.

Q. Had you marked it better than it had been?

A. Yes. Originally there was a stake with a rag on it, and I didn't want any trouble, and so I put some rocks which were available at a radius of 20 to 25 feet and told the men, "Don't even go inside the radius."

Q. Was that the substance then of your conversation with Sgt. [28] Hodges? A. Yes.

Q. The next day, the second day, did you again utilize the services of army personnal?

A. Yes.

(Testimony of John Phillip White.)

Q. How many men did you have on that occasion?

Mr. Scholz: What day was that?

Mr. Bloom: Well, it was the next day. It was either the 20th or the 21st.

The Witness: Well, I didn't have all the same people. I believe I had four people the next morning; some of those who had been with me the day before and some who were new because of the hours they were on duty.

Q. Was that the day that the accident occurred?

A. I believe the accident occurred the third day I was working.

Q. The second day, I take it, you went through the same collecting procedure?

A. Yes, I think it was the same collecting procedure. It was all the same. It was a simple job.

Q. Now, the third day did you again engage army personnel on their off hours? A. Yes.

Q. How many?

A. I had three working that morning.

Q. Do you remember the names of those particular men and what [29] their ranks were?

A. I don't remember their ratings, but there was one named Lang. I don't recall the names of the others.

Q. There were three, one of whom was named Lang, is that correct? A. Yes.

Q. What time of day did you go out to start collecting? A. About 8:30.

Q. Once again, I take it that you were confining

(Testimony of John Phillip White.)

your activities to the strafing range depicted on this diagram, is that right? A. Yes.

Q. Will you tell us how you got on the range on this third day?

A. The same way I always did. I came out the road marked "Wheatland Road," turned left, I then turned up the trail that runs parallel there to the anti-tank ranges, and over the wandering road.

Q. You drove with your truck, is that correct?

A. No, I didn't have a truck. I was collecting material. The truck was to come up. I drove in my own car.

Q. And then you had the army personnel in your own car, is that it? A. Yes.

Q. Where did you stop the car? [30]

A. About 300 feet south of the target finders.

Q. Then you got out and walked on the range, did you? A. Yes.

Q. What time of day approximately was this?

A. Around 8:30 or 9:00 o'clock.

Q. What time did this accident occur?

A. About 12:45, I believe.

Q. Had you knocked off for lunch yet or not?

A. Yes, we had knocked off for lunch and then we had come back.

Q. Where did you eat your lunch?

A. They had eaten in the messhall and I had gotten some candy or something of that nature in the Post Exchange.

Q. Then you went back with the same three men, did you, after lunch? A. Yes.

(Testimony of John Phillip White.)

Q. What part of the strafing range did you commence work with your men?

A. I believe we were working the front end of it.

Q. The extreme west end?

A. I believe we were working on—in front of targets 2 and 3.

Q. By targets 2 and 3, I assume you mean the targets which I now mark 2 and 3 on this diagram, is that right? A. Yes.

Q. And you were somewhere in this area between the targets and the target finders? [31]

A. Yes.

Q. Will you tell his Honor, please, what happened at the time or immediately preceding the accident?

A. The man Lang had not gone over to pick up a sack yet——

Q. I am sorry. Would you speak a little louder?

A. I said the man Lang had not picked up a sack yet. We were relatively close together. We were walking close together. And the sack which I had been filling before lunch, I was standing close to it, and Lang was a few feet away from me. He picked up something and said, "Do you want this?" And I see it in his hand, I think that is one of these solid chunks of iron which the sergeant told me would be found on the range. And I said, "No, I don't want it. It is only a small piece of gilding metal with a lot of iron on it and I am not in the iron business."

(Testimony of John Phillip White.)

Although I told him I didn't want it, and not to put any in the sacks, he was standing during the conversation fairly close, but started walking off. Nevertheless, he pitched it to me. I mean, it was a very short pitch. And so I was not greatly concerned about the matter. I attempted to catch it as you would attempt to catch anything that is pitched to you, but I did not hold onto it. It dropped, exploded, and the next thing I know I am down on the ground with both of my feet mussed up.

Q. How far would you say this explosive dropped from your [32] feet? A. One foot.

Q. What was your position on the ground immediately after the explosion?

A. I was sitting down. I was not lying down. I was sitting down for some reason.

Q. What did you do?

A. Seeing that my feet were in a bad way, that the blood was gushing from one of them pretty bad, I took off a belt and made a tourniquet for it. I looked and saw Lang was holding his stomach. And so I called for the other men to go get the car and get Lang in the car. And I took off my shoes and the car was driven by the other man fairly close to us. It was driven close to Lang and while this man was getting Lang into the car, in order not to waste any more time, I walked on my knees and got up to the car myself. I was helped in. I was in the back. Lang was in the front, I believe—no, he put us both in the back. And so I told the man to take us to the hospital as fast as possible, which he did. At the hospital——

(Testimony of John Phillip White.)

Q. Did you have reference to the army hospital at Camp Beale?

A. Yes, the army hospital at Camp Beale. At the hospital a doctor comes out and he starts looking at me, and I told the doctor that I thought the other man was probably the worst because he was holding his stomach, and he said, "I will look at both of you." [33]

Then he tells the man to drive over to the other entrance, and as they are helping me out of the car, I became unconscious for a short time—I don't know how long—but I had no——

Q. Was that the first time that you became unconscious or lost consciousness?

A. I think I was unconscious for a second or two at the time of the explosion, but it all happened so fast—that was the first time—I was conscious all the time we were driving to the hospital.

Q. After you came to on the second occasion then what happened?

A. I was on a Gurney being wheeled down a hall in the hospital, and I was being asked questions; I told them—we had been collecting the bullets so fast that I expected to have the truck load that afternoon. So I asked someone to call Mars Metal Company and tell them, "Don't bother to get the truck up because it wouldn't be loaded." And then I gave my fiancee's address, where she might be reached. They got me in the operating room and they started giving me penicillin, sulfa and blood plasma. And then they gave me some gas. I passed

(Testimony of John Phillip White.)

out, and when I woke the next day I was in a hospital bed with a cast on my feet—on my legs.

Q. Did you sustain any fractures in this accident? A. Yes.

Q. Do you know what fractures you sustained?

A. I had a fracture in the right leg just below the knee, and [34] then I had a number of fractures in both feet, but as to the names of the bones involved, I don't know.

Q. Do you know if you had fractures on the left foot or not?

The Court: The fractures and the nature thereof may be reflected in a medical report.

Mr. Bloom: Yes, your Honor. I will pass on.

Q. First, to get a little on what treatment you had, how long were you in the hospital at Camp Beale? A. Five days, I believe.

Q. Will you tell us generally what the nature of the treatment was that was given to you during those five days?

A. During the first day they cut the nerves close at hand constantly. I was given penicillin every three hours and I was given some sulfa drugs orally every four hours.

Q. Did I understand you to say after you got out of surgery you found you had casts on both feet and legs?

A. Yes, I had casts up to the knees on both legs.

Q. How long did those casts remain?

A. They split the casts the next day because

(Testimony of John Phillip White.)

Captain Finski, the doctor, wanted to see how things were progressing.

Q. It was put back then?

A. But they were put back with adhesive tape after each inspection.

Q. How long was it until they were taken off?

A. Well, I don't know just how many days, but they were there [35] all the time I was at Camp Beale Hospital, and they remained on while—then I was transferred to Mary's Help Hospital here, and my legs were kept in the cast while I was in Mary's Help Hospital.

Q. Will you tell his honor, as far as you are able and as far as you know, what other injuries you sustained as a result of the explosion or that manifested themselves at that time?

A. Part of the bone in the great toe of the right foot, or the bone leading from the big toe, was knocked out. The captain, Finski, performed some sort of an operation so that it took care of it. However, the right toe is considerably shorter than the rest of the toes now. It is in my left foot—the fracture was right here in the right leg—then in the left foot there were wounds where shrapnel had passed right through the foot. One right back of the ankle. There was a great gash over the ankle. There were cuts across the top of my feet. And there was a space right over the arch where a piece of shrapnel passed immediately through the foot, directly through. A couple of the toes were sort of mangled, knocked out of alignment.

(Testimony of John Phillip White.)

Q. Do you know if Dr. Finski removed any foreign metals, foreign substances from your legs or feet?

Mr. Scholz: I think Dr. Finski would be the one to testify to that.

Mr. Bloom: That is true, but he was an army doctor, you [36] know. He is not available.

The Witness: Dr. Finski removed considerable shrapnel, and Dr. Finski was making a little joke about it. It was a shame I was not collecting iron because I had quite a bit of it there.

Q. How long were you at Camp Beale in the hospital? A. Five days, I believe.

Q. Then what happened to you after that?

A. I was put in an ambulance and carried to Mary's Help Hospital here.

Q. And you were under the care of what doctor in San Francisco? A. Dr. Larue Moore.

Q. How long were you in Mary's Help Hospital?

A. From November 27th to January 22nd.

Q. Will you tell us what treatment in general Dr. Moore or his associates administered to you?

A. They continued the penicillin and the sulfa for a certain period. I don't know. I would say five, six or seven days after I got here. And then they continued to inspect my feet every day. They removed additional shrapnel from the heel in one of my feet while I was there at Mary's Help. And they said I ought to be able to get along with only one shot of morphine a day to put me to sleep.

(Testimony of John Phillip White.)

Q. By the time you got out of the hospital had the cast been [37] removed?

A. Yes, the casts were removed while I was in Mary's Help.

Q. When you were discharged from Mary's Help were you using crutches? Were you able to get around? A. I was using crutches.

Q. And you continued to use crutches for how long a period of time?

A. I don't recall how long, but I continued to use crutches. However, I used crutches until the doctor told me to start using a cane, and I have used crutches intermittently since then.

Q. Do you recall that in February of 1947, after you had gotten out of the hospital, that you went to the office of Dr. Moore for another operation?

A. Yes.

Q. Will you tell his honor what that operation consisted of?

A. Some of the shrapnel had worked its way between the bones leading to the toes, and they removed two fairly sizable pieces of shrapnel from between those bones.

Q. Did you use crutches or a cane or both thereafter?

A. Yes, I have used crutches and a cane intermittently ever since up to—I have used crutches as late as July of this year.

Q. If you will recall that in the month of September, 1947, you consulted Dr. John Niebauer at

(Testimony of John Phillip White.)

the Stanford University Hospital. [38] Do you recall the occasion for going to see him?

A. Yes. There had developed a condition on my left foot, and Dr. Moore and his assistants had said, "That has nothing whatever to do with the results of the accident." So I was no longer under the care of an insurance doctor, and I thought that it was a result of the accident. Dr. Niebauer, being an expert in such matters, I went to Dr. Niebauer to get his opinion on what the condition was.

Q. Did he treat you?

A. Well, this condition was an ulcerous condition on the foot, and Dr. Niebauer treated me to the extent that he removed all the ulcerated flesh. He excised it. He lanced it out.

Q. On what foot was this?

A. This was the left foot.

Q. Was it draining? A. Yes.

Q. Was this ulcerated condition localized in one spot or more than one spot?

A. It was localized in one spot, but the spot was growing rather large.

Q. What sensations did you have or symptoms from this condition at that time?

A. Well, all of this time the bottom of my foot has been insensitive to certain stimuli, that is, it is insensitive to heat and cold. It is insensitive to pin pricks. On the other [39] hand, it has been quite sensitive to certain other stimuli. I mean to hit the foot, it hurts. To prick it, I don't feel it.

(Testimony of John Phillip White.)

Q. Was that the condition you then complained of when you went to see Dr. Niebauer?

A. I know I went to see Dr. Niebauer and I asked him about this ulcerous condition, this stinking sore on the bottom of my foot. I wanted to know what it was. Was it a result of the accident or was it not a result of the accident? Was it something I was going to have to take care of or was it something the insurance company should take care of?

Q. He cut away, as I understand it, the flesh and debriated the injury, is that right?

A. He cut away the dead flesh and told me to get on crutches and stay on crutches. Don't put any weight on it. And he told me it was a result of the accident, the severance of the nerve, that without the nerve power that such conditions did arise.

Mr. Scholz: I will object on the ground that that is hearsay also.

The Court: Where is the doctor? Is he available?

Mr. Bloom: Dr. Niebauer is. However, Dr. Morrissey, who has taken over the treatment, will be in court, your Honor. I do not think there is any necessity to get Dr. Niebauer.

Q. You went on crutches, then, did you?

A. Yes. [40]

Q. How long did you continue on crutches?

A. I was on crutches until I went in the hospital in November of that year.

(Testimony of John Phillip White.)

Q. Did your condition improve or did it go back?

A. From the time I went to see Dr. Niebauer until the time I went to the hospital I would say there was a slight improvement in it. I was on crutches. I was not subjecting it to pressure.

Q. Was there still drainage from this ulcerated area?

A. Yes. Not as much, but there was still drainage.

Q. Is that the reason why you consulted with Dr. Morrissey?

A. Well, I wanted a correction of the condition.

Q. Yes. Well, you did in early November solicit the aid of Dr. Edmond Morrissey, is that correct?

A. That is right.

Q. What, if anything, did Dr. Morrissey then do for you?

A. Well, Dr. Morrissey says, "You got to have complete rest. You've got to get off the foot completely. You are going into the hospital." He sent me to the hospital on November 10th.

Q. What hospital?

A. To St. Mary's. And there he made regular inspections of the area, and I was completely off my feet. And he told me that I was scheduled for an operation, but he was not going to operate until that area had healed up, because he was not going to operate while there was an open sore in such proximity. [41] Eventually it did heal over due to—I think it was six weeks of bed rest, and Dr.

(Testimony of John Phillip White.)

Morrissey operated for the splicing of some nerve in back of the ankle.

Q. What happened after that?

A. A couple of weeks later—he put my foot in a cast at the time this happened, and then a couple of weeks later he opens up the wound to see if the nerves have done properly. He closes it up again, puts a cast on it, and I stayed in the hospital a while longer, and then I had a walking cast put on and I got out of the hospital again.

Q. When were you discharged again from the St. Mary's Hospital?

A. Around February 1st.

Q. Of what year? A. 1949—1948.

Q. 1948 you mean?

A. 1948. That was from November, 1947, to February, 1948.

Q. How long did this walking cast remain on?

A. Oh, several weeks.

Q. After that did you use a cane or a crutch?

A. I used a cane when the walking cast was taken off. Of course, I used a cane while I was using the walking cast, too, while I was learning to use it.

Q. How long did that persist?

A. I would say I probably had to use the cane for a couple of [42] months.

Q. Then what happened to your condition after that?

A. After this operation by Dr. Morrissey, there was an improvement—not a great improvement, but

(Testimony of John Phillip White.)

there was some improvement in the sensation of the foot. There was also a diminution of the pain. It was not eliminated, but it was lessened. And then for seemingly no reason it begins to get worse again.

Q. That was about in the middle of 1948, was it not?

A. Yes, about the middle of July, maybe, of 1948.

The Court: Counsel, I think we probably have reached a convenient time when we might recess until 2:00 o'clock. It is now a quarter to 12:00. If agreeable to counsel, we will resume at 2:00 o'clock this afternoon.

(Thereupon an adjournment was taken to 2:00 o'clock p.m.) [43]

Afternoon Session, 2:00 P.M.

Mr. Bloom: With your Honor's permission, I would like to put on Dr. Morrissey as our next witness out of order.

The Court: Yes.

EDMUND J. MORRISSEY

called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

The Clerk: Please give your name.

A. Edmund J. Morrissey.

Mr. Bloom: In the interests of time, you will stipulate the doctor's qualifications?

(Testimony of Edmund J. Morrissey.)

Mr. Scholz: If your Honor please, I have known the witness for many years, and I will stipulate he is eminently qualified, and I will even go further and say he is one of the best qualified men in San Francisco.

Mr. Bloom: Thank you.

Direct Examination

By Mr. Bloom:

Q. Dr. Morrissey, John Phillip White, the plaintiff in this case, is a patient of yours, is he not?

A. Yes.

Q. You have treated him for some period of time commencing with what date?

A. October 23rd, 1947.

Q. And he has been to this time under your general care and [44] supervision, has he not?

A. Yes.

Q. Will you tell the Court, please, from your examination, your first examination of Mr. White, what injuries you found him to be suffering from.

A. The injuries were confined to the feet, especially to the left foot, and he had numerous healed scars, some of which were quite thickened, over the left ankle, on the left foot, and on the lateral side of the left foot he had an ulcerated area, and he had anesthesia, that is, loss of sensation, over the bottom of the left foot, with some limitation of movement of the left ankle joint.

Q. Doctor, in response to subpoena, Mary's Help

(Testimony of Edmund J. Morrissey.)

Hospital of San Francisco has brought into court certain X-rays of the lower extremities of Mr. White, and with the permission of counsel, I would like to have Dr. Morrissey take a look at those X-rays and explain them to the Court. These date back to 1946, Doctor.

A. This is the X-ray of the right foot and it shows a fracture of the metatarsal, the first metatarsal bone of the right foot with a few small fragments present, one at the base of the fourth toe and three very fine ones scattered about the site of the fracture.

Q. How many metallic bodies do you see in that X-ray altogether? [45]

A. Three pinpoint ones and one about the size of the head of a large pin.

Q. What type or kind of fracture is that termed?

A. It is a transverse, somewhat comminuted fracture, because the lines extend up into the head. It is really a transverse fracture. Here is another picture of the same fracture.

Q. Are any additional metallic bodies apparent in that X-ray?

A. No. That is the same thing. There is the left foot. There appear to be two—three metallic bodies present there.

Q. Where are they located?

A. One is between the fourth and fifth metatarsal and the other between the third and fourth,

(Testimony of Edmund J. Morrissey.)

and there was another one, a small one, over one of the tarsal bones.

That is the right foot again.

This shows the right leg, the lower third, and shows four metallic foreign bodies, one of which measures approximately one centimeter by a half a centimeter, and the other is merely a pinpoint. They lie on the lateral, interior surface of the right leg at the junction of the middle and lower third. Here is one of the left heel, and shows two fair-sized ones measuring about a centimeter in diameter on the under surface of the heel of the left foot.

Q. Did I understand you to say, Doctor, that there was fracture apparent in those last X-rays?

A. No, there was a fracture apparent in the first X-rays [46] brought up in the right foot.

Q. According to the medical reports from Camp Beale, or, rather, from Dr. Moore upon his return to San Francisco, there was a fracture of the fibula, near the head of the fibula. Is that apparent in those X-rays?

A. That is probably the film I skipped over. Oh, you might say possibly there was a fracture there. It doesn't amount to a thing.

Q. There was an operation on that at Camp Beale and the report that I have here states that there was a fracture of the head and neck of the right fibula.

Mr. Scholz: Are you referring now to a report of Camp Beale?

(Testimony of Edmund J. Morrissey.)

Mr. Bloom: No, this is of Dr. Moore.

The Witness: Well, if it is, it doesn't amount to anything.

Q. (By Mr. Bloom): It isn't anything too apparent?

A. You see a few lines in there, but it is nothing to be worried about. There is no displacement. They are in good position.

Q. The reports say it was in good alignment and healed in proper course.

The Court: Was there any surgery of consequence?

The Witness: Yes, the surgery is apparent on the plaintiff. The surgery was not for the fracture.

Mr. Bloom: Well, there was some kind of operative [47] procedure at Camp Beale on account of that fracture, I believe.

The Court: I will accept the report. There may have been shell fragments there.

The Witness: I think that is probably what it was.

The Court: Possibly shell fragments removed.

Mr. Bloom: No, there was an actual fracture, if your Honor please, at the head of the fibula.

The Witness: There was what?

Mr. Bloom: A fracture at the head of the fibula.

The Court: That is conceded.

The Witness: We are talking about what the operation was for.

Mr. Bloom: I beg your pardon. I now offer the

(Testimony of Edmund J. Morrissey.)

X-rays as plaintiff's consolidated exhibit next in order.

The Court: So ordered.

(The X-rays referred to were thereupon received in evidence and marked Plaintiff's Exhibit No. 5.)

Mr. Bloom: We might as well finish with these X-rays.

Q. These are St. Mary's Hospital X-rays. These X-rays, Doctor, were they taken at your direction?

A. Yes.

Q. Would you describe what, if anything, they indicate?

A. They are X-rays of the left foot. They do not indicate any definite pathology. The reason we took them was to be sure there was an infection in the bone because of the perforating [48] ulcer on the bottom of his foot.

Q. Are any metallic bodies shown in those X-rays?

A. Not in these. Yes, there is one. It is up under one of these tarsal bones.

Q. What date do those X-rays bear, Doctor?

A. November 14, 1949.

Mr. Bloom: I now offer these two X-rays as plaintiff's exhibit next in order.

The Court: They may be marked.

Q. (By Mr. Bloom): And now to conclude this phase of the case, I show you two more exhibits of Mr. White taken at the St. Francis Hospital, and

(Testimony of Edmund J. Morrissey.)

I will ask you if these were taken at your direction and supervision. A. Yes.

Q. What pathology do they show?

A. On the light I have here they do not show any pathology. There is still that small foreign body present, and another one in the lateral view is shown underneath the heel. By that I meant another foreign body.

Mr. Bloom: We offer this in evidence as plaintiff's next exhibit, your Honor.

The Court: So ordered.

(The X-ray referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 7.)

Q. (By Mr. Bloom): I have asked you, Doctor, to bring with [49] you such records as you have made of this patient for the purpose of refreshing your recollection, if necessary, and I am going to ask you when the patient again came under your care or supervision.

A. Well, he was seen by me, as I stated, in October, 1947, and at that time I recommended that the nerve on the lateral side of the foot be repaired because of this trophic ulcer, hoping that if we brought sensation back to the lateral surface of his feet, that might improve the condition.

Q. Would you explain, if you please, to the Court the cause of trophic ulceration of this type?

A. That is when you have an injury to the nerve and the patient develops a small ulcerated

(Testimony of Edmund J. Morrissey.)

area in the bottom of his foot, and he does not realize what they are, and he keeps walking on it, and it is not painful. And it keeps getting deeper and deeper. That is usually associated with lack of proper nerve supply.

Q. Did you make various objective tests of the condition of that foot at that time?

A. Yes, I did.

Q. What tests did you make, Doctor?

A. I examined the sensation of the foot and went over his reflexes, went over his muscle power.

Q. In examining the sensations in the foot, would you please explain what type of tests you make?

A. Well, the sole of the foot, the only thing you can use is [50] painful stimuli, because sometimes it is so thick they can't apprehend the cotton touch, and he had lost the sensation over the sole of his foot.

Q. Were there any other objective symptoms that you determined at that time?

A. He had these healed wounds on his leg and foot, and I couldn't get pulsations in the posterior tibial artery.

Q. Did you observe his right great toe was shortened?

A. I have been talking about the left foot.

Q. Yes, I understand.

A. Yes, I observed the right.

Q. Is that condition permanent, in your opinion?

A. Yes.

(Testimony of Edmund J. Morrissey.)

Q. And that is due to the removal of bony substance from that metatarsal?

A. It is due to shortening.

Q. (By Mr. Scholz): Are you speaking now of right or left? A. The right foot.

Mr. Bloom: The right.

The Witness: It is due to shortening of the metatarsal as a result of the fracture.

Q. (By Mr. Bloom): All the injuries which you have testified to so far as referrable, are they not, to an explosion or might be referrable to an explosion and the dispersal of shrapnel into the lower extremities? [51] A. Yes.

Q. In your opinion, are all the symptoms the result of that initial accident? A. Yes.

Q. With respect to this trophic ulceration on the left foot, would you please state what treatment you prescribed or administered?

A. Well, the main thing was to get this healed. We repaired the nerve and there has been a return of sensation, although it is not what you would term normal sensation over the foot, but there has been a return of sensation. But the ulcer has broken down on numerous occasions, and on those occasions we put him in the hospital and put him at absolute rest.

Q. You talk about the nerve repair that was made. Will you describe briefly the type of operation and procedure used?

A. All you do is to cut down that exposed nerve,

(Testimony of Edmund J. Morrissey.)

and where it has been severed, you section it back until you reach good nerve tissue on both ends, both the proximal and distal ends, and then bring them together with fine sutures.

Q. Do you recall how long the patient was in the hospital on account of this initial operation?

A. I think I might have it in my notes. It was about the first part of January that he entered the hospital.

Q. Of what year was that, Doctor.

A. 1948, and he was discharged from the hospital on February [52] 2nd, 1948.

Q. Thereafter did you treat Mr. White or operate on his foot?

A. While he was in the hospital, in order to bring those nerves together, they were under such marked tension that after ten days we opened the wound again and exposed it to see that the ends had not pulled apart, and we found the ends to be together, and closed the wound up again. The only other time we operated on him was when we removed a small foreign body from the interior or upper surface of the fourth toe, the right foot.

Q. When was that approximately?

A. That was done on April 27, 1949.

Q. And have you treated Mr. White subsequently to that time?

A. Yes, he has been coming into the office regularly and he has been in the hospital on several occasions.

Q. May I ask why you instructed him to enter

(Testimony of Edmund J. Morrissey.)

the hospital? You instructed him to enter the hospital, did you not? A. Yes.

Q. Why did you prescribe that treatment?

A. An attempt to get the ulcer healed up because it kept breaking down. He would stay off his foot for a while, it would heal up, and then he would go around on crutches, be fairly well for a time and then begin to walk on it, and then it usually broke down and he would come into the office and it would be ulcerated and infected, and we would put him in the hospital and clean it up. [53]

Q. Has this situation persisted to date?

A. I believe it has healed at the present time, but you can't tell when it will break down again.

Q. Is it a fair statement that injuries of this type, where there are nerve involvements, that there is a likelihood or probability that trophic ulceration will develop in the future?

A. I don't think any more will develop, but I think this one will probably persist and continue to break down indefinitely.

Q. How about these various metallic bodies or pieces in both the feet? Does this patient show a tolerance for this type of thing or has he indicated trouble is likely to develop?

A. I think he has a tolerance for them. There is always a possibility, when you have a foreign body any place, that infection might start. But the only one that gave him any trouble was that one on top of the fourth toe of the right foot, which we re-

(Testimony of Edmund J. Morrissey.)

moved. The others apparently up to the present time have not caused any trouble.

Q. Would your opinion in that respect change if you knew that the doctors who had treated him before your treatment were compelled to remove metallic bodies on several occasions because——

Mr. Scholz: I object to that, on the ground it is cross-examining his own client.

The Court: Sustained.

Mr. Bloom: Very well.

Q. As of the present time, Dr. Morrissey, could you tell us [54] what complaints the patient made to you of his present condition?

Mr. Scholz: As of now?

Mr. Bloom: Yes.

The Witness: You mean the last time I saw him at the office?

Mr. Bloom: Yes.

A. He complained of some weakness of the right foot. He complained of weakness of the left foot. He complained of some sensory changes over the bottom of the left foot and some limitation of movement at the left ankle.

Q. In respect to limitation of movement, Doctor, at the present time what have you found in respect to any possible limitation?

A. It is not marked. I do not think that in itself causes any marked disability.

Q. Is there any limitation that you could ascertain? A. In what?

Q. Any limitation of movement?

(Testimony of Edmund J. Morrissey.)

A. Yes, there is.

Q. Where is such limitation?

A. Slight limitation of dorsal flexion of the left foot. Dorsal flexion—that means bringing it up.

Q. Would that impair or affect one's ability to run, climb or the like? [55]

A. It might interfere with his running, but I do not think it would interfere with his climbing.

Q. From your diagnosis of the patient's present condition, would you say that he would suffer in either extremity or both from prolonged physical exercise or lengthy walking?

A. Yes, I feel that there would be a tendency for the ulcerated area on the bottom of the left foot to break down at any time.

Q. Would the shortening of the right toe affect his ability to withstand severe strain or prolonged exercise?

A. It would result in some weakness of that foot, yes.

Q. I think I interrupted you to this extent: Would you please tell us then what symptoms you yourself have diagnosed or observed concerning this patient at the present time?

A. I think I have answered that.

Q. You think that your answers are complete on that?

A. Yes. He has a permanent disability here. There is no question about it. The man has a bad left foot as a result of this ulcerated area that keeps breaking down, and this may continue to break

(Testimony of Edmund J. Morrissey.)

down over a long period of time, and I think he has a permanent disability as a result of that.

Q. And the same applies to permanence concerning that right toe, is that correct?

A. Which would result in some weakness of the right foot.

Q. That, in your opinion, is permanent in character? [56] A. Yes.

Q. Now, if he has further breaking down of this ulcerated area, what treatment will be necessary?

A. Just continuous observation, and when it breaks down, put him at rest until it heals up, hoping that it will heal up. In these cases the question always comes up as to whether it is worthwhile doing a graft on the bottom of the foot, but a graft does not work on any surface like that where you have to put on a lot of pressure. If it was some area where there was no pressure applied, you just dissect your ulcer out and put a graft over it, but it would not do any good on the bottom of his foot here.

Q. Have you recommended to this patient that at the present time he try to avoid undue pressure or strain on that left foot?

A. I have told him that ever since I have seen him.

Q. And that is your recommendation for the future? A. Yes.

Q. The operation which you performed, Doctor, was to the sural nerve, was it not? A. Yes.

Q. Will you please tell us what that nerve is?

(Testimony of Edmund J. Morrissey.)

A. It is just one of those sensory nerves to the foot. It supplies the lateral surface of the foot and passes around in back of the ankle, and all I did was dissect the scar tissue away from it and freshen up the ends of the nerve and suture [57] them.

Q. I think in your report there shows evidence of injury to what is termed the tibial nerve.

A. That is right.

Q. What evidence did you have of such injury?

A. The lack of sensation over the medial surface of the foot, the bottom of the foot.

Q. But you have made no repair or attempted any repair of that nerve?

A. No, because he seemed to be getting some sensation back there.

Q. But there is a possibility that that might be recommended or attempted?

A. I don't think so.

Mr. Bloom: Counsel, I would like to put in evidence these medical reports.

Mr. Scholz: You mean of Dr. Moore?

Mr. Bloom: Yes, and also of Dr. Morrissey's with the exception of one or two. I provided you with copies of those.

Mr. Scholz: Will you let me put in my affidavits of my witnesses?

Mr. Bloom: I think that is an unfair bargain.

Mr. Scholz: I don't think so.

Mr. Bloom: That is a pretty sweeping request. I do not know what witnesses or affidavits you have reference to. Do [58] you object to these reports going in?

(Testimony of Edmund J. Morrissey.)

Mr. Scholz: My reports are just the same as yours, and if you are going to object to mine, I will object to yours. If you will go along with me and let me put my reports in, I will have no objection to your putting your reports in.

Mr. Bloom: I understood that prior to trial——

Mr. Scholz: I said I knew Dr. Morrissey very well, and whatever he wants to testify to—if you want to put his record in, that is perfectly all right with me. I know his statement on the stand would be just exactly as he thought. Isn't that what I told you?

Mr. Bloom: That is correct, but you also, as I understood it, said you would have no objection to any medical reports going in.

Mr. Scholz: Oh, hospital reports. No. But if you put in any doctor's statements, I would like to cross-examine unless you stipulate that I may put in my reports. Do you want to have yours in and object to mine?

Mr. Bloom: Do you have any objection to Dr. Morrissey's reports going in?

Mr. Scholz: He has already testified on all that, hasn't he? He is on the stand and that would be hearsay.

The Court: Do you desire additional matter in the report other than the testimony of the doctors?

Mr. Bloom: Yes, I think they are a little more complete, [59] but I did not want to take up the time of the Court. That is all.

Mr. Scholz: Why not ask Dr. Morrissey?

(Testimony of Edmund J. Morrissey.)

The Court: What specifically do you have in mind? You might read the statement and it may be stipulated to.

Mr. Bloom: Yes. For example, on September 29, 1950, Doctor, you examined this patient and wrote a report dated October 2nd, 1950.

Mr. Scholz: I haven't got a copy of that.

Mr. Bloom: I have a copy.

Mr. Scholz: Maybe I have.

Mr. Bloom: In which it is stated the patient complained of pain, one in the ball of the left foot as well as in the dorsum of the foot coming on usually when he stands on his feet for long periods, sometimes coming on without apparent reason. Sometimes the pain prevents him from sleeping. He describes it as a hot, constructing sensation.

Two, numbness and parasthesia of the lateral and plantar nerves of the left foot.

Three, pain in the metatarsal phalingeal joint of the right great toe, coming on after strenuous activity.

Mr. Scholz: He has already testified to that.

Mr. Bloom: Not quite, not all of it, counsel. I am going to ask if the patient did so complain on that date.

The Witness: Yes. [60]

Q. (By Mr. Bloom): Your report of that date states as one of your findings there is hyperasthesia over the plantar surface of the foot in the area supplied by the tibial nerve. There is hyperasthesia over the lateral dorsal surface of the foot in the

(Testimony of Edmund J. Morrissey.)

area supplied by the sural nerve. I asked you if that was your finding on this patient on this date.

A. That is right.

Q. According to a report dated June 3rd, 1949, under your signature, Doctor, you state that an examination of the right foot shows a subcutaneous nodule about the size of a bee-bee shot palpable on the dorsal surface of this toe. It is extremely tender to pressure. Was that your finding?

A. That is right. That is what I testified, he was taken to St. Francis Hospital with.

Q. That is the occasion when the metallic body was removed? A. That is right.

Q. You also state in this report that in the soft tissues lateral to this bone there are three small opaque foreign bodies, referring to the right foot. Was that your finding?

A. What report was that?

Q. June 3rd, Doctor.

A. That was according to the X-ray findings.

Q. Yes. Your X-ray examination showed that to be the condition of the patient at that time, did it? A. Yes. [61]

Q. Going back to your report of March 27th, 1948——

A. Your Honor, may I interrupt for just a moment.

Q. Yes.

A. My car is parked up there and I have a one-hour parking privilege, and I just want to know how long you are going to keep me here.

(Testimony of Edmund J. Morrissey.)

Q. Probably just for about five minutes more, Doctor. I will make it as fast as I can. In your report of March 27th, 1948, you state there that the patient complained on March 8th, 1948, of certain symptoms which included parasthesia over the left foot, sensory loss over the plantar surface of the lateral side of the left foot; three, limitation of motion of toes, left foot; four, tenderness over the scar on the posterior surface of the medial malleolus; five, slight tenderness over the scar on the lateral malleolus; six, recurrence of trophic ulcer on the plantar surface, left foot, lateral side.

Did the patient make those complaints at that time? A. Yes.

The Court: Do you have any questions, Mr. Scholz?

Mr. Scholz: Yes, I have, but I have no objection if the doctor wants to move his car and come back.

The Witness: Couldn't I send one——

The Court: Someone can go down and put a nickel in the meter.

Mr. Scholz: The captain will take care of your car if [62] you will tell him where it is.

Cross-Examination

By Mr. Scholz:

Q. Doctor, the injuries and complaints of Mr. White are confined to his left foot, is that right?

A. That is the one that I paid most attention to

(Testimony of Edmund J. Morrissey.)

because it was the ulcerated area and the thing that was really the disabling factor, but he did complain of his right foot, too.

Q. Does the X-ray show the trophic ulcer?

A. No.

Q. It would not show up in any X-ray?

A. No.

Q. I couldn't see it there; but that has nothing to do with the pain?

A. That is right. That is why I had the X-rays taken, to see if the bone was involved, because it is a pretty deep ulcer, and with those trophic ulcers and the disturbance in sensation there is a possibility of bone involvement, but up to the present time there has been no bone involvement.

Q. Doctor, didn't he give you a history of cellulitis in his right foot or left foot—I think it was his right foot—about 1945? A. Yes.

Q. Would that have anything to do with this injury? A. No.

Q. Does your report show that he returned to work on March 24, [63] 1947, and had been working ever since outside——

A. Outside of periods he was in the hospital—yes, I feel that is true.

Q. In his past history did he give you any history of any time spent on Saipan or the South Pacific.

A. He said, "Residence, United States 0 to 36." This was in October, 1947. "Except for 19 months spent in the South Pacific during the recent years."

(Testimony of Edmund J. Morrissey.)

Q. And he gave you that as of October 3rd, 1947? A. Yes.

Q. He stated he was 36 years old, divorced?

A. One child.

Q. Will you describe his present illness, and please be as accurate as your notes will show, Doctor. Did he describe his illness due to his dropping a 37 mm. shell?

A. He did not say that he dropped it. Would you like me to read it?

Q. Yes, what he said.

A. "On November 22nd, 1946, while collecting cartridges in salvage operations at Camp Beale, a 37 mm. shell was detonated at his feet."

Q. What I meant particularly was he stated it was a 37 mm. shell which was detonated, is that correct? A. Yes.

Q. Doctor, in that examination of October 23rd you found [64] there were callouses in an area of about an inch in diameter over his left foot?

A. There is a clearly calloused area about one inch in diameter in the center of which is a deep trophic ulcer about one-half inch in diameter over the head of the fifth metatarsal bone on the plantar surface of the left foot.

Q. The metatarsal bone, in ordinary language that I can understand, on the plantar surface of the left foot—where is that?

A. The plantar is the bottom of the foot.

Q. The bottom of the foot?

A. Yes. And the metatarsal is on the lateral

(Testimony of Edmund J. Morrissey.)

side. See, there are three metatarsals. The first is on the medial side and the fifth is on the lateral side.

Q. And that callous was caused by nature trying to protect an injury, would you say?

A. No, it was from putting pressure on that area where he did not feel any sensation.

Q. Doctor, you did not have a chance to read the report of Dr. Moore, did you, before you examined him? A. That is so long ago I can't recall.

Q. The X-rays show the alignment is good, do they not?

A. I do not know whether I have seen any recent X-rays.

Q. I mean the X-rays that you looked at here now.

A. Yes, but all those X-rays show the fracture, and outside of some shortening I imagine it is all right. [65]

Q. There are no fractures noted in the left foot or ankle?

A. Not that I recall, except that one that was supposed to be at the head of the fibula, but that is of no significance.

Q. There was no loss of position? It was right in line, was it not, if there was a fracture?

A. That is right.

Mr. Scholz: I think that is all, Doctor. One more question. I am sorry.

(Testimony of Edmund J. Morrissey.)

Q. There is no evidence of any inflammation, is there, at this time?

A. Not at the present time.

Q. And the motion in the ankle joint is painless?

A. I didn't put any mention here of it being painful.

Q. I am just guessing at it.

A. As I say, I didn't mention it being painful.

Mr. Scholz: I think that is all.

The Witness: Thank you very much.

The Court: The doctor is excused.

Call the next witness, please.

Mr. Bloom: Do I understand, counsel, you have no objection to the hospital records which are under subpoena going in?

Mr. Scholz: Not a bit.

Mr. Bloom: With your Honor's permission, I would like to offer in evidence as plaintiff's exhibit next in order certain hospital records of Mary's Help Hospital. [66]

The Court: No objection to that. They may be received.

Mr. Bloom: I call your Honor's particular attention to an X-ray showing fracture of the neck of the fibula in good position.

(The X-ray report referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 8.)

Mr. Bloom: Also I subpoenaed from the St. Francis Hospital records which I have not even ex-

amined, but I would like to offer them in evidence, if I may.

Mr. Scholz: No objection.

The Court: It is so ordered.

(The St. Francis Hospital records were thereupon received in evidence and marked Plaintiff's Exhibit No. 9.)

Mr. Bloom: I wonder if we might have a brief recess? A witness has just flown in from Los Angeles. I would like to see him for a moment or two before I put him on the stand.

The Court: No objection. How many witnesses do you have?

Mr. Bloom: I will have two more witnesses and then I will finish with Mr. White, and then we are through. Two short witnesses and then we will finish with Mr. White.

Mr. Scholz: How many witnesses do I have, your Honor? One.

The Court: We will take a short recess.

(Recess.)

Mr. Bloom: If your Honor please, to complete these hospital [67] records, I see we neglected to put in the St. Mary's Hospital records. If the counsel has no objection, I will offer these as plaintiff's exhibit next in order.

(St. Mary's Hospital records referred to were thereupon received in evidence and marked Plaintiff's Exhibit No. 10.)

ALBERT L. GOLDBERG

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

The Clerk: Please state your name, your address and your occupation to the Court.

A. Albert L. Goldberg, 126 Palm Avenue, and I am a partner in the Mars Metal Company.

Direct Examination

By Mr. Bloom:

Q. Mr. Goldberg, in the year 1946 were you one of the owners of the Mars Metal Company?

A. Yes, I was.

Q. What was and is the business of that concern?

A. Smelting and refining and handling of scrap metals.

Q. One of your employees at that time was the plaintiff, John Phillip White, was he not?

A. He was.

Q. What function in your organization did he have?

A. Well, he both bought and sold materials on the outside.

Q. In reference to a certain contract for the purchase of [68] metals at Camp Beale in 1946, did Mr. White enter a bid on behalf of Mars Metal Company for that particular job?

A. Mr. White handled that whole transaction from its inception.

(Testimony of Albert L. Goldberg.)

Q. Do you remember when he went up there to commence work on the job?

A. Do you mean the day he went up?

Q. Well, the approximate time.

A. Yes, I remember approximately when he went up.

Q. In the month of November, 1946?

A. That is correct.

Q. Prior to his entry upon Camp Beale to carry out the purchase contract, did you receive any warning of any kind from the War Department or any officials at Camp Beale in reference to the work to be performed?

Mr. Scholz: I object to that on the ground that no proper foundation has been laid. He said White handled the entire contract without exception, and why should the War Department or anyone connected with the War Department warn him?

Mr. Bloom: I submit the contract was with Mars Metal Company.

Mr. Scholz: It was signed by White and he handled it entirely. That is the statement of Mr. Goldberg himself.

Mr. Bloom: The contract, if your Honor please, is signed in the name of the Mars Metal Company. It was their contract and was signed "Mars Metal Company, by John Phillip White, [69] Representative." Therefore any warnings of any kind would properly, we think, be directed towards the concern in whose name the contract stood.

Mr. Scholz: But it could not, your Honor. The

(Testimony of Albert L. Goldberg.)

plaintiff has not shown that any officers of the War Department or any officers of the government dealt directly with Mr. Goldberg. I mean if I took a contract up, signed it in my name, and handled it entirely, it might be in the name of John Jones. They don't know John Jones. I signed it and that is that. It is too remote.

Mr. Bloom: It would hardly be the obligation of the government to give a warning to employees of a concern.

The Court: I think the form of the question is objectionable. You might ask the witness what, if any, communications, either prior or subsequent to the entry of the contract, he had with respect to any possible hazards that might be incident thereto.

Mr. Bloom: Very well, your Honor.

Q. What communications, if any, prior to the signing of this contract did you have with the Government or the War Department or any officers or officials at Camp Beale respecting any potential danger at Camp Beale in the performance of the proposed contract?

A. The only connection we had with Camp Beale through the office was the connection of the contract itself, which was [70] discussed with me before submission as a bid.

Q. Yes, but I am asking you, did you receive any communication——

A. The office received the contract after—the contract itself was submitted in the form of a bid. When the bid is accepted it becomes a contract, and

(Testimony of Albert L. Goldberg.)

the contract was mailed from Camp Beale to our office.

Q. All right. Prior to the conclusion of that contract, did you receive any communication or warning respecting potential danger at Camp Beale in the performance of the contract?

A. We did not.

Q. Did you go up to Camp Beale after this accident had occurred? A. Yes, I did.

Q. When did you go there?

A. I went there the first time the day after the accident occurred. As I recall, the accident—I heard about the accident in the afternoon, and I went there the next morning.

Q. Where did you go? Did you enter the reservation through the main entrance?

Mr. Scholz: I fail to see—I think this is dragging out. I do not see what materiality such a line of questioning would have after the accident occurred.

Mr. Bloom: This is preliminary to a conversation with the officers in charge. [71]

The Court: Ordinarily subsequent events to the accident would be immaterial. What is the purpose?

Mr. Bloom: This is not about any preparations. This is about what was done previously, what procedures were used.

The Court: I will allow it.

Q. (By Mr. Bloom): You went to Camp Beale, did you? A. Yes, I did.

(Testimony of Albert L. Goldberg.)

Q. Did you go by any of the firing ranges?

A. Not the first time I went. I went directly to the hospital and spoke to the doctor in charge, and then I was permitted to talk to White for a short time.

Q. And after that what did you do?

A. After that I returned to San Francisco and returned to Camp Beale the next day.

Q. The next day where did you go?

A. The next day I went to the Adjutant General's office and inquired for the officer in charge of the ranges.

Q. Were you conducted to that officer?

A. I was conducted to Captain Jones' office. I had been informed that he was in charge of those operations.

Q. Were there any other officers then present?

A. I think not, at the time I went in. There were other officers called in later.

Q. Did you have a conversation?

A. Yes, we did. [72]

Q. At that time and place? A. Yes.

Q. With whom was the conversation?

A. Well, the conversation began with Captain Jones and finished with Captain Jones and a Captain Petrie, and a third captain whose name I don't remember.

Q. Will you tell us what the substance of that conversation was?

A. Well, at the time I discussed the matter with Captain Jones. During the course of the conversa-

(Testimony of Albert L. Goldberg.)

tion I asked the captain what was the normal procedure for decontamination by a firing range of an army so as to permit the army or outside personnel to enter in or upon the range. And Captain Jones told me that the procedure was that a detail from the camp in question would inspect the range, and upon finding any unexploded shells or dangerous material the commanding officer of the detail would report to his commanding officer who in turn would report to Captain Jones' office, in which case it was Captain Jones' duty to call out a decontamination squad from some other base. This squad, whose purpose was to travel between various bases—they were trained in that type of work—and render the field safe, after which it was permissible to enter upon the field.

Now, at that point Captain Jones looked over his records and he became very angry and very agitated because he said to [73] the third captain—not Captain Petry, but to the third captain—that the last report he had was that this firing range was a safe range, that it had been decontaminated.

"Now," he says, "obviously there were marked duds on this field and some that were not marked, and obviously the field was not decontaminated," and he was not so notified and that there had been an infraction of army rules.

Q. Was that the full extent of your conversation? A. No, that was not the full extent.

Q. I meant pertaining to this particular subject.

A. Yes, it was. We discussed the newspaper

(Testimony of Albert L. Goldberg.)

aspects of the accident and various other things, but that was the full extent of the conversation directly pertaining to this accident.

Q. Did Captain Jones do anything when he discovered this state of facts? A. I don't know.

Q. Not in your presence, in any event?

A. Not that I recall in my presence.

Q. After this conversation occurred, did you stay on the base?

A. After this conversation occurred, I went away with a sergeant Hodges over to the range. I wanted to see where the accident had happened.

Q. Have you got reference to the strafing range which is depicted on this diagram as the area between targets and target finders, north of the road which runs—— [74]

A. Well, I wouldn't know whether it was north, south, east or west. I know we made a big circuitous trip.

Q. Did you go to the strafing range?

A. We went to the strafing range.

Q. What happened, if anything, there?

A. Well, we examined the ground, and as a matter of fact, we saw a couple of fairly large shells. I would not be familiar with what they were. But I know after we returned Sgt. Hodges sent a detail of a couple of men to out to mark another shell with a red flag that had not previously been marked.

Mr. Bloom: I guess that is all. Thank you.

(Testimony of Albert L. Goldberg.)

Cross-Examination

By Mr. Scholz:

Q. Mr. Goldberg, who was the third officer that you mentioned, the third person?

A. I don't recall his name. I know he was a captain

Q. Do you know what his purpose of being there was?

A. I assumed his purpose—I assumed the reason he was there was because I had some connection——

Q. Not what you assumed. I asked you if you knew what.

A. I know he was called in by Captain Jones along with Captain Petrie.

Q. You asked Captain Jones to explain to you the normal procedure. What is normal procedure or the normal procedure of the army in decontaminating ranges? Is that what you asked?

A. Yes. [75]

Q. When he explained that, didn't he state that when any artillery is fired that sometimes the projectile hits the ground but it does not explode, and that is known as a dud, isn't that correct?

A. I don't recall his explaining that to me. However, I do know that that is true.

Q. That is normal procedure, isn't it? I mean, that is a normal detonating of a dud. It is a shell which has been fired and not exploded.

A. Technically I wouldn't know. I would think

(Testimony of Albert L. Goldberg.)

a dud might be other things, too, but it may be true.

Q. He did not say anything to you about that at all?

A. I don't recall his having discussed that with me.

Q. Do you recall that if he did explain the normal procedure of firing, that while they are firing they have a range officer present at the time of the firing?

A. We did not discuss during that conversation what was done at any time during use of the range as—during firing practice.

Q. I know that, but that is part of the standard operating procedure, is to first locate your shells, isn't it?

Mr. Bloom: That calls for the opinion and conclusion of the witness, your Honor. I object to it on that ground.

Mr. Scholz: This is cross-examination.

The Court: Overruled.

The Witness: What was the question again? [76]

Q. (By Mr. Scholz): It is part of the standing order of procedure, S.O.P., Standard Operating Procedure, before you can render harmless any dud or any shell you had to first locate it?

A. You obviously have to find it before you can get rid of it.

Q. You asked him for the normal operation and the normal procedure, didn't you?

A. I asked him——

(Testimony of Albert L. Goldberg.)

Q. The normal procedure of decontaminating a range? A. That is right.

Q. Didn't he explain during the firing they have a range officer and also a safety officer in the tower; they watch the artillery when they fire, and if that artillery does not explode, they say, "Mark dud."?

A. No, we didn't discuss that. We didn't discuss about any officer marking duds at the time they were fired. I know we didn't discuss anything of that nature.

Q. You know from your own general knowledge that there are shells which are fired and are unexploded? A. I know it now.

Q. Didn't you know it before? How old are you? A. I am 40——

Mr. Bloom: Your Honor, that is argumentative and also the opinion and conclusion of the witness. [77]

Mr. Scholz: I asked him if he knew.

The Court: You might ask him about his experience in these matters.

Q. Have you had any, either professionally as a soldier, as an observer, or as a civilian?

A. I would say I think I know when to be careful, yes. I think I would know when there might be an unexploded shell around.

Q. (By Mr. Scholz): And you do know, as a matter of general knowledge, that when shells are fired, sometimes they do not explode?

A. Oh, I know that.

Q. And you know those shells that land and do

(Testimony of Albert L. Goldberg.)

not explode are dangerous? A. Of course.

Q. And you know that sometimes those shells go into the ground and can not be located?

A. That I wouldn't know necessarily.

Q. You said you went out with Sgt. Hodges to the strafing range? A. Yes.

Q. How many ranges were there out there, Mr. Goldberg?

A. Oh, I don't know. I know there were a number of ranges immediately adjoining that whole area. I understood that there were many types of ranges in that immediate region. [78]

Q. In going out, did you notice any signs on the road driving out there that had "Beware of the Duds," or words to that effect?

A. I don't recall seeing any. There might have been, but I don't recall seeing any.

Q. In other words, you don't remember. This happened four years ago? A. That is right.

Q. And you do not recall now whether you saw them or not?

A. I don't recall having seen any.

Q. How did you know that that was the strafing range as opposed to any other ranges they had out there? The anti-tank range, for instance?

A. Because Sgt. Hodges brought me there.

Q. And that is the way you knew it?

A. That is the way I know it. I never saw a strafing range before.

Q. And you saw a shell out there, did you say?

A. I saw a shell very close—well, may I point out here——

(Testimony of Albert L. Goldberg.)

Q. Are you familiar with this here?

A. Well, I have a general recollection, yes. I assume these are the targets and those are the target finders.

Q. That map has been shown to you before?

A. No, but I was out on that field.

Q. I am talking about this. Have you ever seen this before? [79]

A. Yes, I saw that map once before.

Q. Where? A. In the attorney's office.

Q. Mr. Bloom's office? A. Yes.

Q. Now, you started to say, when I interrupted you, you saw a shell out there somewheres in what you call the strafing range.

A. Well, I don't know. So far as I know, I know there was a road that went around here somewhere, and we walked over a field, and on the way over there we saw, to my best recollection, it was some place here, possibly a hundred yards or so away from what I assumed was actually the strafing range.

Q. What was that shell like that you saw?

A. It was a large piece of ammunition. I wouldn't know anything else about it.

Q. How large a piece was it?

A. Oh, possibly four inches by 12 to 14, as I recall. I might be out a few inches either way, but it looked to me like a pretty important piece of artillery.

Q. You know what we mean, so we know the

(Testimony of Albert L. Goldberg.)

terminology, we are speaking in the same terminology—a shell means the complete projectile; in other words, it includes the loading charge, the fuse, what you might call the warhead, and everything else. Is that what this was? [80]

A. I know it was obviously a piece of ammunition. Whether it was complete or not, I wouldn't be in a position——

Q. You never looked at it?

A. Oh, sure, I looked at it, but I didn't pick it up.

Q. You didn't examine it?

A. Not too closely.

The Court: Did you distinguish between the casing and the warhead itself?

A. That is the point I am making. I don't remember whether the casing was on it or not.

Q. You made that distinction. Anyone knows that. A. Of course.

Q. The casing and the warhead.

A. That is right, and I don't remember whether there was any casing on it or not. I know it was a substantial piece of ammunition. Whether it was exploded or not, I wouldn't know either.

Q. You wanted to keep away from it?

A. I just stepped away from it.

Q. This was marked, was it?

A. No, this particular one was not marked.

Q. Was it plainly observable on the surface of the ground?

(Testimony of Albert L. Goldberg.)

A. Yes, it was plainly observable. There was grass growing——

Q. Who directed your attention to it?

A. I don't remember whether I saw it or the sergeant saw it. [81]

Q. What did you do, if anything, after you observed it?

A. We kept away from it and the sergeant said, "That is the one about which the sergeant sent a detail to mark." Now, there was grass, this brown grass growing, and when you say was it discernible clearly, it was not discernible from 50 to 75 feet.

Q. At least you saw it and the sergeant undertook to do something about it? A. Right.

The Court: Let us go from there.

Q. (By Mr. Scholz): Did Mr. White work on a contingent on this contract or was he on a set salary?

A. Mr. White at that time was on a salary.

Q. Not on commissions?

A. No, he was not.

Q. On this contract he was on a straight salary?

A. Yes, he was.

Q. What was the particular record that you said Jones said he didn't know anything about?

A. Well, I will explain to you. I didn't receive the records, of course, at all. All I know is while Captain Jones was explaining to me what his normal procedure was, he looked through his papers and he complained very bitterly that there had been an infraction of army rules, that he was not properly notified as to the condition of the field previous to White's [82] going on it.

(Testimony of Albert L. Goldberg.)

Q. You do not know what infraction of an army rule it was? A. No, I do not.

Q. You do not know why Captain Jones called this third captain in? A. No, I do not.

Q. You do not know what his official capacity was?

A. I have no idea what his official capacity was.

Q. You do not know what the third captain had to say about it?

A. I remember that he had something to say, but I don't remember what it was.

Mr. Scholz: That is all.

Mr. Bloom: That is all.

JOHN PHILLIP WHITE

resumed the stand in his own behalf.

The Clerk: Let me remind you that you have been heretofore sworn and you are still under oath.

Direct Examination
(Continued)

By Mr. Bloom:

Q. Mr. White, when you were last on the stand we were talking about your physical condition and complaints that you have made, and we were up to the point where you were under the treatment of Dr. Morrissey, you will recall. What did Dr. Morrissey do for you, just briefly, in the beginning? [83]

A. Immediately after I came under Dr. Morrissey's care?

Q. Yes.

(Testimony of John Phillip White.)

A. He said, "Go to the hospital." I went to the hospital——

Mr. Scholz: That is objectionable.

The Court: Overruled.

The Witness: Dr. Morrissey said, "Go to the hospital. You are going to have to have an operation, but we want the ulcer healed before we operate. Go to the hospital and stay in bed." Which I did do for six weeks.

Q. (By Mr. Bloom): What hospital?

A. St. Mary's.

Q. Then what happened?

A. Then Dr. Morrissey operated.

Q. How long did you remain in the hospital?

A. He operated the first time, and then ten or twelve days later he made an inspection of the wound, and then I got out of the hospital, about February 1st or 2nd.

Q. At that time were you using canes or crutches? A. I left the hospital on crutches.

Q. How long did you continue to use your crutches?

A. I think I used the crutches for five to six weeks.

Q. Thereafter what happened in reference to your physical condition?

A. Well, my foot—my left foot, that is—was always in pain. It is now. But in addition to the constant pain, I would have [84] periodic swellings of the foot and intensification of the pain, and a breaking open of the ulcer.

(Testimony of John Phillip White.)

Q. And that condition was called to Dr. Morrissey's attention, was it not?

A. It was. I was seeing Dr. Morrissey regularly at that time every week.

Q. What was the next treatment of any significance that Dr. Morrissey gave you?

A. I got out of the hospital in February, and on several different occasions, because of the condition, Dr. Morrissey told me, "Well, you go to bed Friday and you stay in bed until Monday again. Give your foot two or three days' rest, even though you can't stop working completely."

Q. Did you do that on a number of occasions?

A. Yes, on a number of occasions I had done that.

Q. After that did you require any further medical attention?

A. Well, in the summer of 1948 my foot was in a pretty bad way, and I was put up in St. Francis Hospital where I stayed one full month. That was either August or September, 1948.

Q. That was at the direction of Dr. Morrissey also?

A. Yes. At the end of that time the ulcer had healed again and I was out once again. Once again I got out on crutches, graduated from crutches to a cane, and I would say three months after I was out of the hospital I was walking without the assistance of either. [85]

Q. What happened next, as far as your medical treatment was concerned?

(Testimony of John Phillip White.)

A. I continued to see Dr. Morrissey regularly, and, I don't know, it was perhaps two or three days in the next year that the ulcer broke open again, and I would get back on the crutches. I couldn't afford to completely stop work; I would get back on the crutches and then in 1949, in November of 1949, I was in the hospital for a different illness, and while I am in the hospital, my foot goes bad, not as a result of strain or pressure on it, because it happens while I am in the hospital. I got out of the French Hospital for another illness and Dr. Morrissey puts me back in St Mary's Hospital last November.

Q. How long were you in St. Mary's on that occasion?

A. I believe it was about three weeks. That may be a little longer or a little less.

Q. The treatment there was just complete rest, is that right?

A. Dr. Morrissey's assistant removed the ulcerated flesh at that time and they gave me penicillin. The foot had become quite swollen. It was twice its normal size. The ulcer was open. But they started giving me penicillin and they continued giving me penicillin for ten or twelve days, and the foot returned to its normal size, and when it returned to its normal size I left the hospital once again on crutches.

Q. About when was that? [86]

A. It was about December 5th or 6th.

Q. What happened, if anything, thereafter?

(Testimony of John Phillip White.)

A. Since then I have not had to go to hospitals. On several different occasions I had to go to bed from Friday to Monday because the minute my foot begins to hurt or swell, if I get off it, it gives me relief for the time being. It permits me to go on.

Q. Will you please tell his Honor what your present symptoms are, that is, how they manifest themselves to you?

A. I have a sensation of having my left foot encased in a tight shoe with an appreciable rise in the temperature. The foot feels warm and tightly bound. In the process of my work I find it impossible to walk for any great distance. I no longer even try to run. Once in a while I will try to speed up a little, but it is impossible for me to run without such pain as to make it impossible. I have difficulty in climbing up, of course, although I can now walk downhill fairly well. As far as limitation of my normal activities is concerned, I can no longer bowl or run or hike, which were formerly standard activities with me.

Q. Do I understand that your condition has interfered in your work?

A. The condition has interfered with my work.

Q. In what way?

A. To the extent that I have lost a number of days because I [87] stayed in bed to keep off the ground on days when I otherwise might have worked. It has interfered that way. It has also interfered in that even though I have worked at times when the foot was hurting particularly, I have had to do less profitable pieces of work. Pri-

(Testimony of John Phillip White.)

marily I am a buyer and a seller, and on those days when my foot does not permit me to get about much, then I do less profitable things.

Q. What about the question of sensation in the feet at the present time?

A. The area of insensitivity is almost the whole of the bottom of the foot. Slightly above the bottom on the outer side of my foot there is an area in which sensation is much more sharp and much more intense than is normal. So between the intensity of the bottom of the foot and the hypersensitivity of the side of the foot, I can't feel some things I should feel. I mean, I don't feel heat or cold on the bottom of my foot. But the slightest heat of any sort on the left—on the outer side of the left foot causes a great deal of pain.

Q. How about the question of pain at the present time? Do you experience any pain?

A. The pain is constant.

Q. How would you describe it?

A. I said once before that it is a matter of having on a tight shoe with a rise in the temperature.

Q. Does this interfere with your sleep? [88]

A. Normally, no, but any sustained activity requiring standing on my feet or walking on my feet will so intensify this pain that it does interfere with my sleep.

Q. When this ulceration occurs, are there any different symptoms that you experience?

A. The level of pain rises. However, there is no specific sensation directly to the ulcerated area.

(Testimony of John Phillip White.)

Q. Going back to the question of your knowledge of this area, the strafing range, the anti-tank range adjacent to it, did you at any time that you were at Camp Beale notice or observe any warning signs any place in that area? A. I did not.

Q. You saw no signs on any fences or posts?

A. I did not.

Q. Your attention was not called to any signs or warnings? A. It was not.

Q. At any time that you were on the reservation, is that correct? A. That is true.

Q. Mr. White, in paragraph 8, page 3 of your first amended complaint, you allege that you sustained financial loss as a result of the accident and the injuries, and you stated that your earnings from your employment as a metal salesman at the time of this accident were approximately $250 per month, is that correct? [89] A. That is true.

Q. You further state that as a result of the accident and the injuries, that you were unable to engage in your employment for a period of 17 weeks, to your damage, in the sum of $1,000. I am going to ask you if that is a true statement.

Mr. Scholz: That calls for a conclusion, I think.

Q. (By Mr. Bloom): Well, did you sustain that loss and, if so, over what period of time?

Mr. Scholz: Same objection.

The Court: Overruled.

The Witness: I did have the loss, 17 weeks is four months at $250, is $1,000.

Q. (By Mr. Bloom): When did that loss occur? Was that your initial loss?

(Testimony of John Phillip White.)

A. From the date of the accident until the date of my first return to work.

Q. You then state for a period of 15 weeks you were unable to engage in your employment thereafter, whereby you lost $1,400, and I will ask you if as a result of this accident and the injuries, whether you thereafter lost that sum in wages?

Mr. Scholz: Same objection.

The Court: Overruled.

A. I did.

Q. (By Mr. Bloom): And that 15-week period, roughly, would cover what period of time? [90]

A. It covers the time I was in the hospital the second time or second long period, the time Dr. Morrissey performed his operation.

Q. And of course during that period you did not conduct any of your work, is that right?

Mr. Scholz: That is objected to as leading and suggestive.

The Court: Overruled.

A. That is true.

Q. (By Mr. Bloom): And you did not receive any wages? A. No.

Q. You further allege that as a result of the negligence and the injuries that you were able to engage in your employment in a limited capacity only for 23 months, whereby you sustained further damage and loss of wages in the sum of $2,300?

Mr. Scholz: Same objection.

The Court: Overruled.

Q. (By Mr. Bloom): Is that correct?

A. I stated that.

(Testimony of John Phillip White.)

Q. When you stated that you were unable to engage in your employment, that is, you were unable to engage in it in a limited capacity only, will you tell the Court what you mean by that?

A. My job was primarily to buy and to sell. With the necessity of using crutches, I could not see as many people. With the days that I had to spend away from the work, even when I was not in the hospital, I lost between a sixth and a seventh [91] of the time. Although I was making $250 at the time of the accident, my wages have been raised to $400 by the time I was in the hospital the second time, and then when I got out of the hospital, I was on a commission basis, and although I did not work between a sixth and a seventh of the time, I was making between six and seven hundred dollars a month on commissions, and I feel had I been permitted to work all the time, I would have made at least another $100.

Mr. Scholz: Same objection. Calling for a conclusion.

Q. (By Mr. Bloom): So you calculated your loss upon that basis?

The Court: I will overrule the objection.

A. Yes.

Q. (By Mr. Bloom): And you calculate as a consequence thereof you lost $2,300? A. Yes.

Mr. Scholz: Same objection.

Q. (By Mr. Bloom): This diagram or map, Mr. White, was made according to your directions and general supervision, is that correct?

(Testimony of John Phillip White.)

A. That is true.

Q. And as far as you can recall, it is a fair representation of the area in question, is it not?

A. Yes.

Mr. Bloom: If your Honor please, I offer this diagram in [92] evidence as exhibit next in order.

The Court: For the purpose of illustration?

Mr. Bloom: Yes, your Honor.

The Court: All right.

(The diagram referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 11.)

Mr. Bloom: Your witness.

The Court: We will take the afternoon adjournment until tomorrow morning at 10:00 o'clock.

(Thereupon an adjournment was taken to tomorrow, Friday, at 10:00 o'clock a.m.) [93]

Friday, November 3, 1950, 10:00 A.M.

The Clerk: John Phillip White v. United States of America, on trial.

Mr. Bloom: If it please your Honor, my clients went out the door for five minutes, thinking there would be argument here. They will be back in a moment or two.

The Court: All right.

Mr. Bloom: I ask the indulgence of the Court for a few minutes.

Is your Honor ready to proceed?

The Court: Yes, sir.

JOHN PHILLIP WHITE

resumed the stand in his own behalf.

Mr. Bloom: Your witness, counsel.

Cross-Examination

By Mr. Scholz:

Q. Mr. White, how old are you? A. 39.

Q. What was your occupation in 1941?

Mr. Bloom: I do not know what the relevancy of that is, your Honor.

The Court: The objection is overruled.

A. Part of 1941 I was in the metal business.

Mr. Scholz: I did not hear you. [94]

A. In part of 1941 I was in the metal business.

Q. The first part or the second part?

A. The first part. In the latter part of 1941 I took a position with the Newfoundland Base contractors to build an air base in Newfoundland.

Q. Build air bases?

A. In Stevensville, Newfoundland.

Q. In the first part of 1941 you were in the metals business, and what was your particular business in that business?

A. Basically the same as this now. I am in the metal business for the collection of metals and metallic residues from industrial plants, and I have taken various types of jobs from the reclamation of lead sulphide at oil refineries to reclamation of lead-tin oxides from various factories. As to the particular jobs I might have had in 1941, I don't recall.

Q. You investigated all the possibilities of recla-

(Testimony of John Phillip White.)

mation of any non-ferrous or ferrous metals, is that what is was?

A. No ferrous metals to speak of. Non-ferrous.

Q. Then in the latter part of 1941 you entered into a contract to assist or build airports up in Newfoundland? A. That is true.

Mr. Bloom: May it be understood, your Honor, I object to this line of questioning?

The Court: What is the purpose of this line of questioning? To show a general familiarity with the business? [95]

Mr. Scholz: The purpose is to show familiarity with the operations.

The Court: All right.

Q. (By Mr. Scholz): Were you in the construction of the airports?

A. I was in a phase of the construction. I was in the mechanical maintenance department as a junior executive. I handled cost accounting, time-keeping, placement of personnel in the mechanical maintenance department.

Q. How long did that last?

A. I was there until September, 1942.

Q. September of 1942? A. Yes.

Q. And then from September of 1942 what did you do?

A. I returned to this country and enlisted in the Air Force.

Q. How long were you in the Air Force?

A. I was in the Air Force, but I was kept in a reserve status because of my age and heart condi-

(Testimony of John Phillip White.)

tion for a number of months. I saw no active service——

Q. That is not my question.

A. You asked what I did, did you not?

Mr. Scholz: Will you repeat the question?

(Question read.)

A. In a reserve status from September to August of the following year. [96]

Q. To August, 1943? A. Yes.

Q. While you were enlisted during that time, were you on active duty with the Air Force?

A. I was not.

Q. How can you enlist in the Air Corps and not be on active duty?

Mr. Bloom: If your Honor please, may it be understood that I object to this entire line of questioning on the ground it is improper cross-examination, not within the scope of the direct, and furthermore, it is incompetent, irrelevant and immaterial.

The Court: Overruled.

The Witness: Would you read the question, sir?

(Question read.)

A. There are 10,000 rules in the army with which I am not familiar, and I happened to do it. As to the reasoning of the army staff, I do not know.

Q. (By Mr. Scholz): As I recollect, you said you left the Air Corps in 1943? A. That is true.

Q. What did you do then?

(Testimony of John Phillip White.)

A. On the day I received my release I enlisted in the Seabees.

Q. What did you do in the Seabees?

A. Will you be more specific? [97]

Q. Yes. What did you do in there, in the Seabees?

A. Your Honor, I would like to be helpful, but any man in the service—do you mean what was my rating? What were my duties? Where was I stationed?

The Court: What were your general duties in the Seabees?

A. During the time I was in this country——

Q. What was your rating?

A. My rating was Machinist's Mate Second Class. My duties during the time we were in training in this country before going overseas were for the most part instructor.

Q. (By Mr. Scholz): And you followed the regular course of instruction? What particular battalion was that Seabees that you were in?

A. I was in boot camp at Camp Perry until the 133rd Seabees was formed. When the 133rd Seabees was formed, I was put in Company D, and as soon as the battalion was formed——

Q. You went into the 133rd Seabee Battalion, is that right? A. Yes.

Q. When you were at boot camp, they gave you the normal course of instruction that Seabees have, is that correct? A. I assume so.

Q. Included in that normal course of instruction

(Testimony of John Phillip White.)

is instruction on demolitions or familiarization course, is that not true? [98]

A. That is not true.

Q. There was no instruction on demolition or familiarization course in that course that you took?

A. Familiarization with what?

Q. Demolitions.

A. In Seabee parlance demolition——

Q. No, answer my question.

Mr. Bloom: He is trying to, I think, counsel.

The Witness: In Seabee parlance demolition means demolishing buildings with any tools available from a hammer to a stick of dynamite.

Those of us who had had any experience in demolition of buildings, getting things out of the way were assumed to have such training as we would need along that line. As Seabees we were presumably tradesmen to some extent, and we were supposed to know things.

Q. Then you had experience in demolitions under the term as you used it?

A. Yes, I have had experience in that line.

Q. Did you leave for overseas? A. Yes.

Q. When?

A. Some time in the spring of 1944.

Q. Where did you go? To Saipan?

A. Not immediately. [99]

Q. You went to Honolulu first, of course?

A. I went to Honolulu.

Q. Pardon? A. I went to Honolulu.

Q. And then from there you went to Saipan?

(Testimony of John Phillip White.)

A. That is true.

Q. Pardon? A. I said that is true.

Q. When did you arrive in Saipan?

A. Some time in the fall of 1944.

Q. That was before the island had been secured by the United States Army or Marine Corps?

A. There is a difference in terminology between the Army and the Marine Corps.

Q. They had not declared the island secured at that time, had they?

A. It was secured under Marine terminology. It was not secured until Army terminology.

Q. You are very familiar with this, I see.

Mr. Bloom: If your Honor please——

The Court: These are nice definitions. I am not altogether concerned with them or about them. We are not getting into the case. Counsel, will you proceed with your point and let me have the nature of your cross-examination? I am not interested in these phases. [100]

Q. (By Mr. Scholz): Overseas the Seabees were familiar with demolitions, weren't they? I mean, they had to use them?

A. Yes, we removed various buildings that way in the way of what we wanted to do.

Q. And you were familiar with the various artillery shells? A. No.

Q. You did not know anything about artillery shells?

A. I knew nothing more than any other layman would know.

(Testimony of John Phillip White.)

Q. Or any other Seabee?

A. I didn't know nearly as much as a member of the Seabees.

Q. Have you ever seen any artillery fired?

A. Yes.

Q. And you knew that sometimes artillery shells are fired and after they are fired they do not explode and they are called duds?

A. In general, I would say that is true.

Q. I say, do you know it?

A. Know it? I think that would depend upon the definition of "know," sir.

Q. Well, knowledge of a fact.

A. In that event, I would say no.

Q. You have the general knowledge?

A. I have a rough idea of what a dud is.

Q. You have seen artillery fired?

A. I have seen artillery fired. [101]

Q. And you have seen shells strike that did not explode? A. I have not.

Q. How long were you in Saipan?

A. I don't remember the number of months, but it was a long time.

Q. Where did you go from Saipan?

A. San Francisco.

Q. You came back here. You heard the statement of Dr. Morrissey the other day that you were in the South Pacific 18 months?

A. That is approximately correct.

Q. When you came back here you went with the Mars Metal Company?

(Testimony of John Phillip White.)

A. After several months' resting.

Q. When did you join the Mars Metal Company? A. On July 26, 1946.

Q. This accident happened November 22nd, 1946, did it not? A. That is true.

Q. At that time were you residing at 749 Octavia Street, Apartment 316, San Francisco?

Mr. Bloom: If your Honor please, I do not know what these collateral matters have to do with the issue.

The Court: I will permit it until we see the nature of the subject matter sought to be elicited. You may proceed.

A. Actually, no. [102]

Q. (By Mr. Scholz): Where were you residing then? A. In a hotel.

Q. Did you ever reside at 749 Octavia Street, Apartment 316?

A. Your Honor, that depends upon the definition of "reside." I am not trying to be evasive.

The Court: Explain it, then.

A. But officially my residence was at 749 Octavia Street.

Q. (By Mr. Scholz): That is sufficient. Initially, that was your residence. Do you recall a statement that you made on November 27, 1946, at Camp Beale, California? I hand you herewith, not a statement, an affidavit sworn to before the summary court officer up there. I hand you this affidavit or what purports to be an affidavit signed by you and ask you if that is a copy of the statement you signed.

A. It seems to be.

(Testimony of John Phillip White.)

Mr. Scholz: I will offer that in evidence, if your Honor please, as Defendant's Exhibit A.

Mr. Bloom: If your Honor please, I do not understand why it is a proper exhibit. There is nothing in there that I can see by way of impeachment. It would appear to me it is improper to tender it in evidence.

The Court: Mr. Scholz, you can lay the foundation for statements made at other times inconsistent with a person's testimony given at the time of trial in the nature of impeachment under the rules. You can lay the foundation for [103] impeaching evidence in the nature of declarations made under oath, but there is no foundation thus far laid for the introduction of the statement. You might specifically ask the witness if at a certain time and place he did not say the following. Thus far there hasn't been any foundation laid.

Mr. Scholz: That is what I wanted to do, but I first wanted that in evidence.

The Court: No, ask him if that at a certain time he did not make a certain statement.

Mr. Scholz: I should have said for identification instead of in evidence.

The Court: Mark it for identification.

Mr. Scholz: Then I was going to go through it.

The Court: It may be marked for identification.

(The document referred to was thereupon marked Defendant's Exhibit A for identification.)

(Testimony of John Phillip White.)

Q. (By Mr. Scholz): I hand you herewith Defendant's Exhibit A for identification and ask you if this question was asked you and if you made this statement:

"Where did you obtain Lang and Vanderpool?

"A. From the MP barracks."

Is that correct? A. Yes, that is true.

Q. Then the second question: "Did you just go into the barracks and solicit help? [104]

"A. Yes, I asked if anyone wanted to work gathering brass for $1.00 an hour."

Is that a statement you made? A. Yes.

Q. The next question: It is marked "A", but it means Question.

"Q. Whom did you ask if you could go into the barracks and get the men?

"A. I asked no one specifically if I could go into the MP barracks and get men."

Did you make that answer to that question?

A. That is true.

"Q. Why did you pick on that particular barracks?

"A. Having been in the service myself and knowing MPs, I went in there."

Is that a correct statement?

A. That is true.

Mr. Bloom: If your Honor please, I do not want

(Testimony of John Phillip White.)

to interfere with the procedure, except I do not see any inconsistencies or impeachment with any other statements.

The Court: I will allow it. You are probably coming up to the point. I will allow it. This is preliminary.

Mr. Scholz: Anyway, he said he asked the executive officer if he could get men. I believe it was on direct examination. And that impeaches that part of it. [105]

That is not so material. I am just bringing it up to the rest of it. I have to connect it up.

> "Q. Just what happened after you started working around 11:00 o'clock or so?
>
> "A. We went out there and I showed the men my bags and wirepullers and a number of cartridges already stacked up. I explained to the men that I wanted the empty cartridges, that I knew there were two duds out there, so leave them alone, secure them. That is all I wanted, was empty cartridges. After we had worked about an hour I said, 'We have worked an hour. You can see clearly how these things are scattered. You should have some idea how quickly you can pick them up. If you want to pick them up at $2.00 a sack rather than $1.00 an hour, it is all right with me.'
>
> "They agreed they would pick them up at $2.00 a sack. It so happened Lang was picking up immediately adjacent to where I was picking up. I had just deposited a couple of hand-

(Testimony of John Phillip White.)

fuls into the sack when Lang handed me a projectile and said, 'Take a look at this.' I said, 'It is nothing but iron, not enough brass to pay for the salvage. I don't want it.' And then I just dropped it."

Did you make that statement at that time?

A. I probably did.

"Q. Are you an ex-service man? [106]

"A. Yes. I was a Seabee on Saipan and had some knowledge of ammunition, but not much."

Is that a correct statement?

A. It sounds reasonable.

"Q. About what size would you say the shell was? A. It was a 37 mm."

Did you make that statement?

A. I think so.

Mr. Scholz: I will offer this in evidence now, if your Honor please.

Mr. Bloom: If your Honor please, I will object to its being offered in evidence. I assumed the purpose was to impeach by showing conflicting statements. I see nothing of any conflict save possibly on minor collateral matters.

The Court: It may be argued—I am not asserting now as to the nature of the conflict—it may be argued by the Government that with respect to the one phase of this statement particularly having to

(Testimony of John Phillip White.)

do with the receipt of the dud and the dropping thereof, that there is a conflict of testimony. This witness has testified it was thrown to him by another. To that extent there may well be a conflict. I am not discussing the matter now. It may be argued hereafter. But I will allow it for that purpose.

(Defendant's Exhibit A was thereupon received in evidence.)

The Court: And as to his general knowledge of the [107] terrain, method of operation and the like.

Q. (By Mr. Scholz): Mr. White, how did you know that was a 37 mm.?

A. I have a reasonably accurate eye for measuring things.

Q. I am sorry. I can't hear.

A. I said I have a reasonably accurate eye for measuring things. I know how much a millimeter is.

Q. While you were handling it, it looked like it?

A. No.

Q. You say you measured with your eye, is that correct? A. Yes.

Q. When did you measure it with your eye?

A. While it was in the other man's hand.

Q. From glancing at it or, as you put it, measuring it with your eye, you knew it was a 37 mm. shell?

A. Once again, I didn't know it was a 37 mm.

(Testimony of John Phillip White.)

However, I have sufficient acquaintance with the terminology to know that 37 is a common size, approximately an inch and a half in diameter. The sergeant had shown me a number of solid chunks which he had said were 37 mm. anti-tank projectiles.

Q. He had shown you a number of them out at the target range?

A. No, at the range office. I assumed it was a 37 mm.

Q. You had seen, as you have stated, a 37 mm. shell before, is that correct?

A. This is not a shell. It is a missile, a projectile. [108]

Q. I hand you herewith—I think it is your exhibit, Plaintiff's Exhibit 4—and ask you, does this correspond with the shell that you handled?

A. A portion of this item from the crimp to this end of it does.

Q. This portion from the crimp here to this end here does, and this portion was not connected, is that correct?

A. It had nothing to do with it.

The Court: Pardon me. I was distracted by the noise. Will you repeat that?

Q. (By Mr. Scholz): The portion from the crimp—what do you call that?

A. I assume it is the nose.

Q. The nose was there, but from the crimp to where——

(Testimony of John Phillip White.)

A. This that I have always called the cartridge portion was not there.

The Court: Just the firing end of it?

A. Just the head of it, Judge.

Q. What is that head called technically?

Mr. Bloom: That is the fuse head.

Q. (By Mr. Scholz): This is the projection: the powder which projects the warhead—that is a general term—it is not correct terminology. And then when it hits on the nose here, this part explodes.

The Court: The casing was not present, just the warhead? [109]

The Witness: It was just the front end of it, just the projectile, that portion which is cast out.

Q. (By Mr. Scholz): I believe you stated on direct examination you went up to Camp Beale about September, 1946, and you saw either the commanding officer or the executive officer, is that correct? A. That is true.

Q. Didn't at that time either the executive officer or the commanding officer—I think you stated you did not know which—direct you to see a range officer, Captain Jones?

A. I don't believe so. I believe Sgt. Hodges was called in directly without going through channels.

Q. Did you know Sgt. Hodges was under Captain Jones? A. No.

Q. You did not know that? A. No.

(Testimony of John Phillip White.)

Q. Did you know what Sgt. Hodges' duties were up there? A. Roughly.

Q. Well, was he a range sergeant?

A. I was told that he was.

Q. Who told you? Captain Jones?

A. No, the gentleman who provided me with him as a guide the first time I was there.

Q. Before commencing this work up there, you had to coordinate things with the range officer, didn't you? [110]

A. Before the actual operations?

Q. Yes. A. Yes.

Q. You went to see Captain Jones, who was range officer at that time, did you not?

A. I went to see a captain who was the range officer.

Q. Who was range officer? A. Yes.

Q. Do you recognize Captain Jones here?

A. I don't recognize him, but I wouldn't say that it was not he.

Q. When you came in here, didn't you bow to him and acknowledge him when you first came in here yesterday? A. Oh, yes.

Q. Didn't Captain Jones at that time warn you that there might be duds out there?

A. Out where?

Q. Out on the ranges, particularly the strafing range.

A. I was warned that there might be duds on the areas where I had not yet investigated, the straight artillery ranges where I had not yet in-

(Testimony of John Phillip White.)

vestigated. As to the strafing range, I was given no notice that there were any—that there was any possibility of unmarked duds on the strafing range.

Q. How many ranges were there up there?

A. I don't know. [111]

Q. How many do you recall? A small arms range——

A. Two rifles, two machine, one pistol, the strafing range, the mock town where street fighting was practiced, and I was told that there were—then the anti-tank range shown on the sketch here, and then I was told that there were artillery ranges a number of miles over. I never went onto those artillery ranges.

Q. They warned you about duds on all the ranges except what you call the strafing range, is that correct? A. No, that is not correct.

Q. What did you say then when I asked you whether they warned you about duds? Didn't you say they warned you on all ranges except the strafing ranges? A. No, I did not.

Q. I am asking you, what did you say?

A. I said I was warned of the possibility of duds on those ranges. I had yet to investigate them. There was no warning about duds on the machine gun, the pistol, the rifle ranges or strafing ranges which I had investigated.

Q. Oh, I see. You had made a complete investigation of that, then, prior, before working?

A. No, I had not made a complete investigation.

(Testimony of John Phillip White.)

Q. You made an investigation then. I do not know whether it was complete or not.

A. Oh, yes, I had made an investigation. [112]

Q. However, out there they did show you some duds on what you call the strafing range, did they not, and you marked one here as X?

A. I was shown that dud. It was marked.

Q. That was a 37 mm. dud also? A. No.

Q. What kind of dud was that?

A. It is my opinion it was a 75 mm.

Q. 75? A. Yes.

Q. You said that was a freak because the sergeant said they do not usually find those kind of duds on a strafing range, is that right?

A. I said that the sergeant said that it was a freak.

Q. Is that what you said?

A. Yes, I said the sergeant said it was a freak. I didn't say it was a freak.

Q. No, I said the sergeant told you it was a freak because they don't usually find those 77 mm. or that particular kind of dud on that range, is that correct? A. That is true.

Q. That strafing range was a range which was used by the Air Corps in strafing ground objects, is that right, firing on ground objects?

A. Practicing strafing of personnel. [113]

Q. Is that right? A. I think so.

Q. You know, being employed at air fields, in the Seabees and so forth, you know that they do not fire 75 mm.'s from airplanes, do you not?

(Testimony of John Phillip White.)

A. No, I wouldn't say I knew that. I would say it was my impression that strafing is usually done by light, maneuverable planes that do not carry 77 mm. cannon on them.

Q. They carry 30 and 50 caliber, do they not?

A. A number of them carry 50 caliber. I don't know whether any carry 30 caliber or not.

Q. Will you state what conversation you had with Captain Jones prior to working there?

A. As part of the contract I was required to keep my operations in conformance with any firing schedules that might be—I went to see the captain, to see that my operations would not interfere with any firing. I also, going to see him, wanted to check up on the general impression that I had that artillery projectiles are 95 to 100 per cent iron. On the other hand, I don't know a great deal about——

Q. Are 95 to 100 per cent what? A. Iron.

Q. I am sorry. A. I-r-o-n.

Q. Iron? [114]

A. I don't know a great deal about ammunition. I didn't then, and I wanted to verify the general impression before discarding the possibility of recovering metal from the artillery ranges. So I went to him with the double purpose in mind of making my operations conform to the firing schedule and also finding out what else I could about artillery projectiles. The captain told me that my operations would not interfere with any firing operations. There was no intention of holding any fire prac-

(Testimony of John Phillip White.)

tice either on the strafing ranges or on the machine gun ranges, which I had considered very close to the margin of whether it would be profitable to work them or not profitable to work them, that they were not going to use either of those ranges. Therefore my operations would not interfere with any firing schedule. He also informed me of the possibility of dangerous duds on the artillery ranges, and confirmed my impression that they were primarily iron and therefore of no interest to me.

Q. Did he explain to you the S.O.P., or Standing Operating Procedure, for marking duds?

A. No.

Q. I thought you stated that he did so on direct examination. I may be mistaken.

Mr. Bloom: No, he said Sgt. Hodges.

Mr. Scholz: Oh, Sgt. Hodges did that.

A. Sgt. Hodges explained to me a procedure which he told me [115] had been followed.

Q. (By Mr. Scholz): Now, at that time you knew that duds were dangerous, did you not?

A. Yes.

Q. With regard to your damages, you returned to work on March 24th, 1947?

A. I have heard that, but I do not think it is true. I think it was April 1st when I returned.

Q. 1947? A. Yes.

Q. Have you got a copy of your income tax returns for 1946, 1947, 1948 and 1949?

A. I probably do.

Q. May I have them this afternoon?

(Testimony of John Phillip White.)

A. That is hardly possible, sir.

The Court: What is the purpose? To establish a date?

Mr. Scholz: To establish the earnings.

The Court: To establish the earnings?

Mr. Scholz: Yes.

Mr. Bloom: In previous years?

Mr. Scholz: The accident happened November, 1946, between 1946, 1947, 1948 and 1947.

Mr. Bloom: I submit, your Honor, that there has been plenty of opportunity to subpoena those. I believe it would be an imposition on this man, who lives in Sausalito. I do not [116] know whether he has his copies available. It seems to me rather late in the day to be asking for them.

Mr. Scholz: All I want to do is give the Court information on this.

The Court: What disagreement have you on earnings?

Mr. Bloom: None that I know of.

Mr. Scholz: I do not know what he is earning.

The Court: What is the contention as to earnings?

Mr. Bloom: $250 a month plus commissions at a later date. As I understand it, the counsel wants to go on a kind of fishing expedition.

Mr. Scholz: No, I do not want to go on a fishing expedition. I want to give the Court information which, if you are successful in recovering a judgment in this case, the Court may use to decide what damages, if any, you have suffered.

(Testimony of John Phillip White.)

The Court: How long was this plaintiff out of employment as a result of this accident?

Mr. Bloom: There were three periods of inactivity, two complete and one partial as testified to and as set forth in the amended complaint, depending upon the periods of time he was in the hospital or immediately thereafter. Of course, the hospital records are in evidence to substantiate the period of complete inactivity.

The Court: What is your contention as to average earnings per month, salary, and commission as to the loss? [117]

Mr. Bloom: In the beginning the testimony shows that the witness was earning only a straight salary of $250. Later on that was augmented by commission to $600 or more or $700 a month.

The Court: The books of the company are available, are they not?

Mr. Bloom: Well, they would be available, I suppose, if counsel wants them.

The Court: Income tax returns, I think—well, do you want the books of the company?

Mr. Scholz: Yes, I would like to take a look at them. If counsel will show them to me outside the court——

The Court: Why can't you do this? During the noon hour you might make an investigation and the books might be shown you with respect to the current earnings of the man during the period he claims he was out of employment, and those books should reflect the facts. There is no use getting income tax returns.

(Testimony of John Phillip White.)

Mr. Bloom: I do not know what the books show, how they were kept or anything, but I am perfectly willing to do what I can to have them brought here.

The Court: All right. It would just be a ledger account, after all, probably two or three ledger sheets, commission sheets.

Mr. Scholz: I have no knowledge at all of his earnings. [118]

Q. Did you say that the projectile that you picked up was a solid iron casting?

A. I don't recall saying I picked up any projectile.

Q. The projectile which exploded, do you say it was a solid iron casting?

A. No, I didn't say anything like that.

Q. Was it the same as the top of your Exhibit No. 4 here?

A. I had a very short inspection of it in Mr. Lang's hand. I am not competent to say whether it was identical with that or not. It appeared to me in his hand to be a solid cast iron projectile. The results showed it obviously was not.

Q. Over in Saipan the Seabees were engaged in clearing land for——

The Court: Pardon me.

Q. That was a little bit unusual, that projectile as you found it? It was not the type of material you would gather? A. Not at all.

Q. It was an unusual type of material?

A. It did not appear to be unusual. It appeared unwanted. It appeared to be the sort of thing, Judge, that the range sergeant had shown me in

(Testimony of John Phillip White.)

his office saying I would find a number of them. But I had not found any, in spite of his telling me I would find a number of them there.

Q. (By Mr. Scholz): Over in Saipan the Seabees were engaged [119] in clearing off land for landing fields, were they not, and clearing off land for utilization by various island units?

A. Yes.

Q. While over there, was there any fighting going on?

A. There was sporadic shooting going on.

Q. Were you engaged among other things in clearing the land, too? A. Yes.

Q. I hand you herewith, Mr. White, what purports to be a map from the War Department of the Camp Beale reservation, official map, and ask you if you are familiar with that map.

A. I am not familiar with the map.

Q. You never saw it before, I presume?

A. No.

The Court: We will take a recess for a short time. You can familiarize yourself with that.

(Recess.)

Q. (By Mr. Scholz): During the recess, Mr. White, did you look at this map and familiarize yourself with it?

A. I looked at it and I found several familiar ideas. I didn't completely orient myself.

Q. Will you indicate on that map with a little x where the accident took place?

(Testimony of John Phillip White.)

A. That is something that I am not able to do.

Q. Can you locate on that map where any of the ranges are? [120]

A. Here is the rifle range along the road, although farther apart than indicated by the map, it seems to me. Here is the pistol range and the machine gun range.

Q. That is a scale map. You know what a scale map is? A. Yes, I know.

The Court: Where is the range that is the subject of this inquiry?

A. That, your Honor, I do not know. I remember coming out this road, but I forget whether this road—I turned to the left, I turned to the right, to get to the range in question.

The Court: Let us point it out, Mr. Scholz.

Q. (By Mr. Scholz): Can you point out approximately where the accident took place?

A. No. Once I reach this junction I am lost.

Mr. Scholz: I offer this for identification, if your Honor please.

The Court: Mark it for identification, Mr. Clerk.

(The map referred to was thereupon marked Defendant's Exhibit B for identification.)

Q. (By Mr. Scholz): Now, you went on the roads out to the range? A. Yes.

Q. Did you not observe some signs out there, warning signs, approximately 8 feet by 10 feet or even larger, possibly smaller, warning you that they were the firing range and [121] beware of the

(Testimony of John Phillip White.)

duds or words to that effect? A. I did not.

The Court: How large were the signs, Mr. Scholz?

Mr. Scholz: 8 by 10 feet.

Q. You never saw any of those signs at all?

A. I did not.

Q. In clearing the battlefield at Saipan, were you ever warned about duds?

A. I never cleared a battlefield.

Mr. Bloom: If your Honor please, I did not understand there was any testimony that this witness cleared any battlefield.

The Court: The witness has testified that there was sporadic firing on Saipan when he was working as a Seabee, and that was the extent of the testimony.

Mr. Bloom: That was my understanding.

The Court: There is no testimony of any battleground, however.

Mr. Scholz: Well, it was a battleground. I think your Honor will take judicial notice of that.

Q. However, in clearing the ground were you warned of any duds?

A. No, the areas we were clearing had not been actually the areas of fighting.

Q. How do you know that? As a matter of fact, they were fighting all over Saipan, were they [122] not?

A. There was rifle fire all over the island.

Q. Anyway, while you were there were any Seabees injured, become casualties or killed be-

(Testimony of John Phillip White.)

cause of running into duds while clearing the fields? A. Not while clearing the fields.

Q. Were any of them injured in operating on the ground?

A. Not to the best of my knowledge.

Q. What was your rate in the Air Corps?

A. Private.

Q. What particular training did you have in the Air Corps? A. None.

Q. What particular qualifications did you have in the Air Corps?

A. I wouldn't say I had any.

Q. Pardon?

A. I wouldn't say I had any particular qualifications for the Air Corps.

Q. Did you do any flying yourself?

A. When?

Q. During the war. A. No.

Q. Before the war? A. Some.

Q. When did you see the range officer? Do you remember the date that you saw him? [123]

A. I believe the first day I saw the range officer was the day the contract was awarded.

Q. That was November 18th?

A. I believe so.

Q. At Camp Beale? A. Yes.

Q. Did you see him afterwards?

A. I don't recall.

Q. You may or may not; you do not recall?

A. I may or may not have.

Mr. Scholz: That is all, your Honor.

(Testimony of John Phillip White.)

Redirect Examination

By Mr. Bloom:

Q. Mr. White, do I understand you to testify that you received no training in the Air Force, is that right? A. That is right.

Q. And you never saw active duty, is that right?

A. That is right.

Q. You have had no artillery training of any kind, did you? A. That is right.

Q. No decontamination of artillery shells or duds, training in that? A. That is right.

Q. Or anything related to it, is that correct?

A. That is true.

Q. Does the same apply to your tour of duty as a Seabee? [124] A. Yes.

Q. Then, in other words, you had no decontamination training as a Seabee? A. No.

Q. Did you have any training in the firing of arms such as artillery?

A. No, my training in firing of arms was limited to a carbine and an M-1.

Q. And you had no training, did you, in the matter of demolition of shells or duds of any kind?

A. No.

Q. I take it that your demolition training as a Seabee was confined to the destruction or removal of structures, is that correct? A. Yes.

Mr. Scholz: That is leading and suggestive.

Mr. Bloom: Well, that is his testimony. I want to clarify it.

(Testimony of John Phillip White.)

Mr. Scholz: It is still leading.

The Court: That was his testimony.

Q. (By Mr. Bloom): So it is a fair statement, is it not, that at no time in your life have you received any instruction from the Government in the matter of handling ammunition such as high explosive shells? A. That is true. [125]

Q. And you have no experience with high explosive shells of any kind?

A. Not except these ones.

Q. Except this one current. It answers the counsel's question then in the matter of firing of any weapons before the war, what did you have reference to?

A. I do not recall such a question.

Q. Maybe I misunderstood. Did you or did you not testify that you fired some weapon or weapons before the war?

A. I don't recall so testifying. Like everyone else, I shot shotguns and rifles.

Q. That was the only type of weapon you fired before the war? A. Yes.

Q. And during the war and since what type or kind of firearms, if any, have you fired?

A. Rifles and shotguns.

Q. You have never fired an artillery piece in your life? A. No.

Q. In reference to the exact manner in which this accident occurred, will you please tell the Court the exact manner in which this accident occurred, what transpired immediately before and at

(Testimony of John Phillip White.)

the time of the accident? In other words, where was Private Lang?

A. Private Lang was quite close to me.

Q. About how far away? [126]

Mr. Scholz: I object to that, if your Honor please. He went over that on direct examination and I went over it on cross-examination.

The Court: I will allow it.

A. I would say when that conversation started, Private Lang was within five or six feet of me.

Q. (By Mr. Bloom): And what transpired?

A. He picked up this item, which I assumed to be a 37 mm., anti-tank. He asked me if I wanted it. I tell him no. There is only a piece of iron with a piece of gilding metal around it, and not enough gilding metal to make it worthwhile.

During the course of the conversation, possibly immediately afterwards, Private Lang reached over to either hand it or toss it to me. We were relatively close together at the moment, and I attempted to catch it as you would anything that is pitched to you or thrown at you, and I dropped it.

Q. The projectile that was in Private Lang's hand, and which was thrown across to you, did it have the appearance to you of one of these solid iron anti-tank projectiles that Sgt. Hodges had previously shown you at the range firing house?

A. It did.

Q. Did you think it was one of those or that type of solid iron projectile? A. I did.

Mr. Bloom: I think that is all. Thank you. [127]

(Testimony of John Phillip White.)

Recross-Examination

By Mr. Scholz:

Q. Mr. White, you said you thought that was a solid iron projectile, and yet you identified this as being exactly the same type as what you picked up, is that correct?

A. That is not correct, sir.

Mr. Scholz: That is all.

The Court: How far was Lang from you when he threw this?

A. I would say, your Honor, that he was—at the moment he was about as close as you and I are, but he was walking away to start working again.

Q. Did you tell him it was a type of material that you did not want before or after he tossed or passed it to you?

A. I started the conversation while it was still in his hand.

Q. And it was then obvious to you it was not the material you were interested in?

A. It was obvious it was not the material I was interested in.

Q. Did you ask him to throw it or did he do it voluntarily?

A. Eh? He did it of his own volition.

Q. After you told him you were not interested?

A. Yes.

Q. How long would you say you had it in your hand or hands? A. A second, a half second.

(Testimony of John Phillip White.)

Q. Did you inspect it while in your hands or not?

A. I could only assume I looked at it for the short period of [128] time that it was in my hand, but I did not have a firm grip on it. It was not a matter of making a complete inspection or anything else. I mean I would look at it.

Q. When he threw it or passed it to you, you saw him do that, did you? A. Oh, yes.

Q. You reached out to catch it? A. Yes.

Q. How long did you hold it?

A. A second, a half second. I didn't grasp it firmly.

Q. Did you hold it long enough to make an inspection? A. No, sir.

The Court: I have no further questions. The witness is excused.

JEAN WHITE

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

The Clerk: Please state your name, your address and your occupation, if any, to the Court.

A. Jean White, 4 Third Street, Sausalito.

Direct Examination

By Mr. Bloom:

Q. Mrs. White, you are the wife of John Phillip White, the plaintiff in this matter, are you not?

A. Yes. [129]

(Testimony of Jean White.)

Q. Will you speak a little louder so we can hear you, please? A. Yes.

Q. In the year 1946 you made a visit, did you not, with the paintiff to Camp Beale?

A. Yes, I did.

Q. Do you remember approximately the date that you went up there with him?

A. It was about the first of October.

Q. Will you please tell us where you went, to your best recollection, when you got on the reservation?

A. We went past the Administration Buildings, we picked up the sergeant at the range office, I think.

Q. Do you know what his name was?

A. Sgt. Hodges.

Q. You knew he was the range sergeant, did you? A. I believed so.

Q. Then where did you go?

A. We left our car and we got into the sergeant's jeep and we went out onto the ranges.

Q. Did you in particular, referring to the diagram, Plaintiff's Exhibit No. 11, go out into the area adjacent to the strafing range?

A. Yes, we did.

Q. What time of day approximately was it?

A. It was shortly before lunchtime. [130]

Q. In reference to the target finders indicated on this Exhibit No. 11, would you tell us about how far away you came before your jeep was stopped?

(Testimony of Jean White.)

A. The sergeant drove his jeep right up to where the cartridges were lying on the ground. I believe it was between the finders and the targets.

Q. Somewhere between the targets and the finders, that is, the strafing area proper, is that right?

A. Yes.

Q. Was there any conversation at that time between Mr. White and Sgt. Hodges that you overheard?

A. I remember that Mr. White and the sergeant got out of the jeep and that Mr. White said to the sergeant, approximately, "It is safe here, isn't it?" And the sergeant said that it was.

Q. And then you got out of the jeep?

A. Yes, we walked around on the range then.

Q. How long did you walk around there?

A. Possibly twenty minutes.

Q. And then he returned you in the jeep back to the range office, did he? A. Yes.

Mr. Bloom: Thank you.

Cross-Examination

By Mr. Scholz:

Q. I do not suppose, Mrs. White, you could [131] identify what route you took on this map, could you? There is the main barracks over there.

A. No, I am afraid I could not. I know we went out through the gate, but there were several roads, and I don't remember the directions.

Q. You do not remember where on this map you went or where the accident—when you visited

(Testimony of Jean White.)

there October 1st you do not remember where you went, on this map?

A. All I remember is that the strafing range was several miles from the gate.

Q. Going out there, you follow the roads going clear out there?

A. Yes, we left the road to go onto the range, onto the strafing range.

Q. How far off the road did you drive?

A. Well, there was a gravel road and then there was a track where cars had previously gone in the past.

Q. That was unimproved road? A. Yes.

Q. Is that what you were on?

A. Yes, and then we did leave that, too, to go right up onto the range.

Q. Did you leave that in your car, your vehicle?

A. I beg your pardon?

Q. Did you leave the unimproved road in your vehicle? A. Yes. [132]

Q. How far off the unimproved road did you go?

A. Possibly a half a city block. I am not really sure.

Q. As I understand it, isn't the strafing range here, going approximately 15 paces?

A. 15 paces?

Q. Isn't that right?

A. Didn't they say 600 feet?

Q. I don't know. I wasn't there. Between the target firing and the target, was it 600 feet?

(Testimony of Jean White.)

A. I don't know. I am not good at estimating distance.

Q. What is your best estimate?

A. I just don't know.

Q. Would you say as long as this room or longer? A. I think it is longer.

Q. Pardon? A. I think it is longer.

Q. Was it twice as long or less or more?

A. I would have to guess.

Q. Roughly?

A. It might be twice as long.

Mr. Scholz: That is all.

Mr. Bloom: I now offer in evidence, if your Honor please, War Department Circular No. 195 under date of June 29, 1945, and under the signature of G. C. Marshall, Chief of Staff, as plaintiff's exhibit next in order. [133]

Mr. Scholz: I will stipulate it is an official copy. In fact, you got it from my file.

The Court: What is the part of that that you desire? You may read any such parts as you wish.

Mr. Bloom: (Reading.)

> "Effective until December 29, 1946, unless sooner rescinded or superseded:
>
> "1. Ammunition, general policy. Large areas of land, if and when acquired or leased by the United States for use as maneuvering areas, target ranges, bombing ranges or gunnery ranges and embraces such lands as will eventually be placed in a surplus category by

the War Department and released for civilian use: Any unexploded ammunition or duds which remain on these lands will render them unfit for civilian use unless the areas as neutralized, to remove any possible danger to persons, animals or personal property. It is the obligation of the War Department in the interest of the United States to restore such areas by locating and removing or neutralizing so far as practical, all explosives which remain thereon.

"Responsibility: The examination and policing of maneuver areas, targets, ranges, bombing ranges and impact areas for the removal and/or detonation of duds and other unexploded ammunition is a responsibility of the commanding officer of each installation or the [134] tactical commander having responsibility for the operation of an area for which an installation commander is not otherwise responsible."

I offer this, if your Honor please, to show the duty——

The Court: Well, that obligation, of course, was slightly different from the obligation that might attach to an invitee under these particular conditions. The Government is charged with ordinary care and this, of course, would apply to areas which ultimately fall into the control of civilians after the uses and purposes of the Government have subsided. It might be relevant. You may argue from it as to the general over-all responsibility.

Mr. Bloom: Yes. I particularly offer it, your Honor, by virtue of the fact that a request for interrogatories which is on file here asking for any and all pertinent government regulations within the knowledge of the officers in question, and this is the only circular to which reference has been made.

The Court: All right, sir.

Mr. Scholz: Your Honor stated our objection.

The Court: Go ahead, Mr. Scholz.

Mr. Scholz: Your Honor has stated our objection to that. I do not think it is material.

The Court: I have stated the general over-all view I would take. I assume it is yours.

Mr. Scholz: That is right. [135]

(The regulations referred to were thereupon received in evidence and marked Plaintiff's Exhibit No. 12.)

Mr. Bloom: If your Honor please, I have shown counsel receipted bills for hospitalization, services of physicians, ambulances and the like.

The Court: I think on that score it might be the subject of a stipulation as to the reasonable value thereof.

Mr. Bloom: Yes, counsel is willing to do so. However, he raises the question that there is a carrier involved here and I represent the carrier, and I told counsel that I would file a lien for this amount, and I ask leave and permission of your Honor to prepare such a claim of lien and ask counsel if he will stipulate then that these expenses

in total sum of $3,167.09 were incurred by way of hospitalization, ambulances, nursing charges and the like, and that they are the reasonable value thereof.

Mr. Scholz: If your Honor please, here is the situation: I do not dispute the bills here, but I think it is my duty to advise the Court of the law. These were paid out under the Workmen's Compensation Act by the Compensation Insurance Company. Therefore I do not see how your Honor can consider that——

The Court: He proceeds under the doctrine of subrogation, isn't that correct?

Mr. Bloom: Yes. If your Honor please, there are a number [136] of cases—I did not think this point would be raised for the reason that there are a number of cases in other jurisdictions where the allowance has been made for the carrier's expenditures, and then on the judgment it is segregated so much for the expenses of the carrier to be impressed with trust on behalf of the carrier, so much for attorney's fees, if any, and the balance for the judgment for the plaintiff, without any formal intervention or claim of lien. However, if a claim of lien is desired or asked for, or if your Honor thinks it is desirable, I will file such a claim.

Mr. Scholz: Your Honor will appreciate I have no objection to it. The only thing I do think it is my duty to advise your Honor of the law as the United States Attorney's office sees it. Outside of that, we do not care, but from my experience in

these cases before other courts here, they have always rejected that and made them file suit. I had one before Judge Roche, and I stipulated with the insurance company the same as we are asked to do here, the same situation—not the same type of tort case, however—and the insurance company filed the suit. I stipulated that the Government would be bound and they would be bound by whatever judgment was made in that main suit, and we stipulated to the cost, and so forth. I think that is what they have to do. I do not think the court can award a judgment to Mr. White because he has not paid these bills, and the Government can pay only money to the person actually [137] entitled to it. I do not care, but I do not want to see either counsel go wrong or the court go wrong.

Mr. Bloom: If your Honor please, I have in the courtroom at the present time a citation to several cases where the procedure that I outline was done. It is true sometimes it is done by a separate suit by way of subrogation. Sometimes it is done by way of intervention, and it has been held by our courts, including the Supreme Court of the United States, that that is a proper way of proceeding.

The Court: There isn't any question of intervention or interpleader as the proper mode?

Mr. Bloom: Yes.

The Court: But that was not done in this case.

Mr. Bloom: That was not done in this case and I do not think it is necessary. All these cases have held that. The Federal Rules—I think it is Rule 17—says the real party in interest has to bring the

suit. These cases have held that that does not forbid the Court in an action of this type of award the damages that have been segregated and impressing them with a trust on behalf of the carrier or whoever has expended the money to prevent multiplicity of actions and the like. So with your Honor's permission, I will, however, file a claim of lien as is frequently done in the State Courts.

The Court: Yes, you may do so.

Mr. Bloom: Thank you, your Honor. And then, counsel, do [138] I understand that you will then stipulate——

Mr. Scholz: Here is what I will stipulate to: that the Industrial Indemnity Exchange had paid $2,038.84.

Mr. Bloom: Yes.

Mr. Scholz: I understand you checked it up yourself and you found you had given me the wrong figure.

Mr. Bloom: That is correct.

The Court: That is for hospitalization and medical?

Mr. Scholz: That is for hospitalization—hospitalization, $1869.22; physician and surgeon service $877.17; ambulance, X-rays and other costs, $245.

The Court: Did the petitioner or plaintiff here receive compensation?

Mr. Bloom: Yes, of course, he received, I think, a thousand dollars or approximately that.

The Court: Did he receive a permanent rating of disability?

Mr. Bloom: No, your Honor, no permanent rat-

ing. That is, it was never asked for. He received by way of compensation $1,271.45.

The Court: Had the time or the period elapsed wherein the plaintiff might apply for permanent rating under Workmen's Compensation?

Mr. Bloom: No.

The Court: The time is open? [139]

Mr. Bloom: The time is open, yes.

The Court: In the light of Dr. Morrissey's testimony, the man is suffering a permanent disability. It might or might not be provident, in the light of what eventuates in this court, to make application. How long is your time open?

Mr. Bloom: I understand it is five years.

The Court: There is no question this man has suffered a severe injury to his foot. That ulcerous condition is one I am familiar with, and Dr. Morrissey's testimony is clear on the subject. He has a permanent disability. There is no question about that. You do not deny that.

Mr. Scholz: I am not, your Honor.

The Court: As to the permanent character of this disability.

Mr. Scholz: If your Honor please, I have known Dr. Morrissey very intimately for many years, and I have had him on my side of the fence and on the other side, and I am willing to take his testimony.

The Court: I am willing to take his testimony. I have had him in many cases. I know Dr. Morrissey's testimony is pretty accurate. Of course, we are all subject to the frailties of human nature, but Dr. Morrissey is an able man, and when he testifies

this plaintiff is suffering, I am willing to take it in the absence of some very serious conflicting testimony.

All right. You may proceed. [140]

Mr. Scholz: I will stipulate that the Industrial Indemnity Exchange paid John Phillip White 12——

Mr. Bloom: That is no part of the case, the temporary disability payment.

Mr. Scholz: Yes, it is.

The Court: Pardon me, counsel. I was distracted.

Mr. Bloom: Your Honor asked me about the temporary disability payments and I advised you what had been done. That, of course, has no part in this case, and we can not recover for temporary disability payments on behalf of the carrier or anybody else.

Mr. Scholz: But I think the Court ought to be advised how much temporary disability he has received.

Mr. Bloom: He has been so advised.

Mr. Scholz: Do you want me to stipulate that the Industrial Indemnity Exchange paid out $3,000——

Mr. Bloom: $3,167.09.

Mr. Scholz: Have you checked that yourself, personally?

Mr. Bloom: Yes.

Mr. Scholz: I will take your word for it. So stipulated.

The Court: So stipulated.

Mr. Bloom: Thank you. And that they were reasonable in amount.

Mr. Scholz: Yes.

The Court: And were incurred, and that is the reasonable [141]

Mr. Scholz: Reasonably incurred.

The Court: So stipulated. That completes the plaintiff's case?

Mr. Bloom: With one exception, your Honor. There is on file in the action an order for the production of certain documents ordered by his Honor, Judge Roche.

The Court: Yes, I glanced at that order.

Mr. Bloom: In response to that order, counsel has provided me with two of the nine items in question. Now I would like to ask him again at this time if he is able to produce the balance of these records, and if not, would he please explain his inability.

The Court: Were the decontamination records produced?

Mr. Bloom: No, your Honor.

The Court: Would they be material?

Mr. Bloom: Yes, I think they would.

The Court: They would show what efforts were made to decontaminate the area in question?

Mr. Bloom: Yes.

The Court: You may, however, get that on your examination of Captain Jones. He will take the stand. Do you have those records, Mr. Scholz, the decontamination records?

Mr. Scholz: I gave him a copy of the records.

The Court: I think material also would be the range firing records showing the periods of time. [142]

Mr. Scholz: We haven't got that. You see, your Honor, I endeavored to get those, although I did not think it was our particular responsibility. Camp Beale is closed up, and all these records went back to the depository at St. Louis, Missouri. We asked for these records, and I have a memorandum to the range officer, covering the period of November and December, 1946, of which I have given you copies, I believe, but the firing on the range, we have no records of that outside of what is in the testimony of Captain Jones.

The Court: Let us see what eventuates on the examination of Captain Jones. However, you desire them in advance of that?

Mr. Bloom: Yes, we feel, and I think rightly so, that we have been seriously prejudiced in the preparation of the case for trial, and as a matter of fact, since this information is in the sole custody of the Army, we feel we do not want to be penalized.

The Court: Counsel, I will grant you a continuance so those records will be produced.

Mr. Scholz: How can we produce records when we do not have them? I know what the situation is. I happened to be in the Army. I had a replacement depot before I went overseas. We closed it up and sent all our records back to St. Louis. Those are the only pertinent records.

The Court: Captain Jones, will you take the stand, [143] please? You might examine him on this subject.

ROBERT S. JONES

was called as a witness on behalf of the Court, and being first duly sworn, testified as follows:

The Court: Mr. Bloom, you might examine Captain Jones preliminarily here with respect to the order made by his Honor, Judge Roche, on October 11th, ordering the production of certain documents. If those records are not available, all well and good. If they are available in some other depot or source, then I will allow a reasonable time to get production if they be deemed to be necessary for your case.

The Clerk: Please state your name, rank and your official capacity to the Court.

A. Robert Sumner Jones, Captain, United States Air Force, Reserve. My present organization is the 28th Strategic Reconnaissance Wing, Heavy, Rapid City Air Force Base, Weaver, South Dakota. Do you wish my serial number, sir?

Direct Examination

By Mr. Bloom:

Q. Captain Jones, in November, 1946, would you please tell us where you were stationed?

A. Yes. I was stationed at Camp Beale, California.

Q. What was your rank at that time?

A. I was a captain.

Q. What was your position in the service at that reservation? [144]

A. At that time I held an A.U.S. commission in the infantry as captain. I was detailed for duty with the Air Corps. I was at that time under orders assigning me to special staff duty with the Ninth

(Testimony of Robert S. Jones.)

Service Command at Camp Beale. My primary position or duty was as post operations officer. However, I had many additional duties.

Q. Did you have anything to do with the operation or control of the firing ranges?

A. Yes, an additional duty I had was as post range officer.

Q. How long did you occupy that position of post range officer, by the way?

A. I believe I was assigned that additional duty about July, 1946, and I terminated all of my duties shortly before we closed the installation, after I had closed my affairs in each particular duty. I was relieved on competent orders from that responsibility. I believe it was about June, 1947. You must appreciate the fact that my profession is governed by many, many, many written orders.

Q. So I understand.

A. And it is very difficult for me to place these dates accurately without my own records, which I do have, however.

Q. As post range officer you had under your custody and control various records pertaining to the firing ranges, did you not?

A. Yes, I had all existing records in the range office at the [145] time I assumed that position under my custody.

Q. His Honor, Judge Roche, in this particular case, has ordered the production of the decontamination records of the United States Army for firing ranges 9 and 10 B and the strafing range adjacent thereto at Camp Beale, California, for the period

(Testimony of Robert S. Jones.)

January 1, 1944, to and including November 22nd, 1946. I am going to ask you whether decontamination records were kept of those ranges during that period.

A. With the Court's permission, that would entail a rather lengthy explanation to adequately explain to you the standard operating procedures employed in conducting the de-dudding procedures, and if you are willing, I shall.

The Court: Go ahead.

The Witness: My records did not contain any record of firing to speak of, for the simple reason that as the various organizations would fire upon the ranges, and conclude their firing, these records would be kept for a predetermined length of time and then destroyed.

The Court: As to accuracy, firing power and the like?

A. Yes, number of rounds fired, the organization date——

Q. That would affect inventory, supplies, and so on, criteria of conduct of personnel and the like?

A. Yes. It must be understood that Camp Beale was in all probability one of the largest ranges we had on the West Coast, with perhaps the exception of Fort Ord. It was a personnel [146] replacement depot and they did train mechanized divisions there. So they had firing from all phases of small infantry weapons, flat trajectory weapons up to the heavy caliber weapons, 75, 155, 105 millimeter mortars—all the weapons employed by the infantry.

(Testimony of Robert S. Jones.)

Q. (By Mr. Bloom): May I interject and ask this question? A. Certainly.

Q. If the particular firing records of these ranges were only kept for a short period of time, it is true, is it not, that records were kept and maintained as to what type of firing was done on what ranges in general terminology?

A. Yes. From time to time the range officer was required to inform his commanding general the types—other information regarding the firing that had been conducted on his ranges over a specific period of time.

Q. And such records, I assume, were maintained for the period in question at Camp Beale, California, were they not?

A. Yes. Let me further explain, however, Camp Beale was comprised of two separate functioning cantonments—three actually. The cantonment of which I was a part was the actual command administrative function. We referred to it as Main Post, where the headquarters existed.

We had a second cantonment, which was the personnel replacement depot concerned with the training, replacement of individuals or units; and the third was a mechanized division, [147] which was usually a complete unit, organically and technically, but, of course, they maintained their own records of firing and supplied everything. We simply kept house for them, so to say, and I never did have copies of their range officers' records. Actually, I was over-all responsible, or the range officer at that

(Testimony of Robert S. Jones.)

time was responsible primarily for the coordination of the firing of various units and also for the maintenance of the ranges.

Q. But you do know such records were kept?

A. Yes. However, at this point I would like to suggest that at such time as we close Camp Beale I as post operations officer received a directive pertaining to the records that I would send for permanent storage. Other records not pertinent or in my opinion, not pertinent, were destroyed at my direction.

Q. Well, now, going back to the decontamination records, they were not destroyed, were they?

A. Let me pick up the vein again. As units would fire, it was the officer in charge of the range or firing, that is, an officer provided by the tactical unit conducting the firing, who was responsible through the Department of Observers, to observe any dud—I believe it is understood now that the terminology of a dud is a projectile, explosive type, that failed to detonate on impact. He would record the approximate location of these projectiles and immediately upon the cessation [148] of firing he would send crews out with their sketches and they would attempt to locate—at least the impact area—mark them, and get their proper demolition people in to destroy them, efforts being made at all times to reduce the number of duds to a minimum. That was the usual procedure in the disposition of duds. However, at such time as firing ceased on the ranges at the end of hostilities, our mission changed. The

(Testimony of Robert S. Jones.)

commanding general through his designated representative requested the range officer to submit a report to him as to the status of the ranges, with particular reference to the de-dudding that had been accomplished.

Now, counsel has a copy of that particular report. At such time as I was informed by the commanding general of the decision from Washington that we were to declare Camp Beale as surplus, I was requested to make my own survey records; also, if necessary, a physical survey of the ranges, and inform him of the status, and that I did, including a physical survey.

It is unfortunate, but copies of the map that I submitted with my report were not forwarded apparently with this other material, but I did contain the former range officer's report with my own simply to justify my remark to the engineer that the provisions of such and such a circular had been complied with.

Q. Then I take it you know that there are these records in existence? [149]

A. I do not know. It would be my opinion, because the actual records that counsel has were appended to a formal investigation that was made, coordinated through my office, to determine causes, and so forth, of the alleged accident, and I did submit at that time information to the investigating officer where he could obtain such records. It is possible, if we do not or have not been able to get them from St. Louis, the district engineer might

(Testimony of Robert S. Jones.)

possibly have a copy of my report, the original that had the actual map showing the number of times each area had been de-dudded or surveyed.

Q. What did you tell the investigating officer as to where these records could be obtained, Captain?

A. Well, he knew at the time because we had various staff meetings to discuss our progress in preparing the camp for surplus, and each of we staff officers would review for the general's benefit primarily the activities we had accomplished. We knew that my records—my report had been submitted to the district engineer because naturally that was the most important concern of my own at the time.

Mr. Bloom: Would your Honor care to take a recess at this time?

The Court: Have you satisfied yourself, counsel, that you desire additional records, or do you feel the examination of the captain would suffice?

Mr. Bloom: I think, with your Honor's permission, we might [150] see what can be developed.

The Court: You might reserve your request on that.

Mr. Bloom: Yes, if I may.

The Court: We will take up then, at 2:30.

(Thereupon an adjournment was taken to 2:30 o'clock p.m.) [151]

Afternoon Session, 2:30 P.M.

Mr. Scholz: If your Honor please, during the noon hour Mr. Bloom handed me statements which he stated is the withholding statement of John Phillip White, is that correct?

Mr. Bloom: Yes.

Mr. Scholz: And the withholding statement of the wages paid John Phillip White for 1947; the total wages was $2,334.23, and for 1946 it was $297.14.

The Court: That represents the loss or alleged loss?

Mr. Scholz: That is the total wages paid in 1947-1946. When did he start working for them, do you know?

Mr. Bloom: In 1946 in the month of July.

That is the wrong figure.

Mr. Scholz: I was looking at the wrong employee. Correct that, Mr. Reporter. In 1946 it was $907.50; in 1947 it was $2,334.23. In 1948 he hands me a statement which I assume is taken from the books of the Mars Metal Company which shows the total earnings of $4,661.42, and then there is also a paper represented to me as being taken from the books of the Mars Metal Company for four months in 1949. That is when he left and became self-employed. $416.45.

Have you submitted your case?

Mr. Bloom: Yes.

Mr. Scholz: If your Honor please, at this time I would [152] like to make a motion for non-suit. Knowing your Honor pretty well, I haven't too

much expectations it will be granted. However, the motion for non-suit is based upon the following: first, the duty to a licensee is not to wilfully or wantonly injure him.

The Court: An invitee?

Mr. Scholz: Yes. Secondly, the proximate cause of the injury or the negligence, the proximate cause of the negligence was the negligence of his own employee.

Three, under his story as told on the stand or under the sworn statement of his own negligence here, there is contributory negligence.

A third point is that he had been under contract to go over to the strafing range, and he knew there was a range which was used, and he is an experienced man. He knew that there would be duds on the place. He not only knew there were duds on the place, but he saw some, I think, but he found one and marked it himself. As a matter of fact, he testified he marked under the sergeant's direction or someone in the armed personnel. He is a man approximately 35, 34 years at the time; had military training, and knew the consequences of going on the range. He had been warned to stay away from duds. In fact, one dud had been pointed out to him. I could add a great deal more to that, your Honor, but I think that briefly is the motion. Your Honor is familiar with the testimony here. [153] We submit our motion, on those grounds.

The Court: I will deny the motion at this time.

Mr. Scholz: Captain Jones, will you take the stand?

ROBERT S. JONES

was called as a witness on behalf of the defendant, and having been previously duly sworn, testified as follows:

The Clerk: You have heretofore been sworn and you are still under oath.

The Court: You might bring us right down to the events of the day in question or immediately prior thereto, because the captain has already qualified himself. He has stated his background and he has already stated in one form or another for the record his duties generally. So you might bring us right down to the events.

Direct Examination

By Mr. Scholz:

Q. Captain Jones, you were the operation officer and the post range officer at Camp Beale, California, in the month of November, 1946? A. I was.

Q. In such duty did you meet Mr. White, the plaintiff in this action? A. I did.

Q. Will you state to the Court the circumstances?

A. Yes, sir. I believe it was approximately the month of [154] September of that year when Mr. White was introduced to me as a representative of the Mars Metal Company. He disclosed to me a letter prepared by h e a d q u a r t e r s, Sixth Army, addressed to me simply as Operations Officer, as I recall, advising me of his business at the installation. He was basically to survey the ranges with

(Testimony of Robert S. Jones.)

the thought of making bid for the procurement of the non-ferrous metals existing thereon.

Also in the letter were instructions to me to afford him assistance in finding these areas and giving him such other courtesies as he required.

At that time I did not have the time myself to go out on the ranges with him and I designated my range sergeant as my representative.

Q. When and where was this conversation held?

A. This conversation was held in the headquarters of Camp Beale, in the post operations office.

Q. About when was this? You say in September, 1946?

A. I believe it was approximately September.

Q. What was said and what was done in that conversation with Mr. White?

A. Well, naturally Mr. White queried me for my opinion as to the most profitable ranges for his type of enterprise. He had explained to me rather clearly what he was interested in. That was at that time during that conversation about the gist of the important matter we discussed, other than my offer to [155] give him every assistance and make those arrangements.

Q. Did you have another conversation with him?

A. Yes, I did.

Q. When and where was that conversation?

A. It was on or about the 18th of November, at which time Mr. White entered my office, showed me the contract that had been awarded to him, and we discussed his plan of operation at that time. He

(Testimony of Robert S. Jones.)

told me he would like to begin operations immediately.

Would you care to have me go into detail as best I remember the conversation?

Q. That is right.

A. He asked me at the time whether or not he could use military personnel. I explained to him that he could not employ military personnel or equipment. In fact, it was my responsibility to further explain that he could in no way deface the ranges. If he did, he would be expected to restore them. I went through the usual explanation to him of his obligations to the service in that respect.

Q. Did he ask you anything about where he could obtain this assistance or help?

A. Yes, he did.

Q. At that time?

A. Yes, sir. He asked me if I could recommend a source where he might obtain labor, and I suggested the Farm Labor Bureau, [156] or whatever it was. I have forgotten the nomenclature. Or I suggested that he perhaps see Mr. Shingle, who was president of the Chamber of Commerce in Marysville, that he was very cooperative and perhaps could help him along those lines.

I asked him if he had equipment and trucks and he assured me he did.

And at that time I believe it was his stated intention to go in and see these agencies in order to procure the labor necessary.

I also explained to Mr. White at the time that it

(Testimony of Robert S. Jones.)

was my responsibility to advise him these ranges in all probability had contained unexploded missiles, that I had just completed a survey of the ranges personally and had arrived at that conclusion, and that we had a directive which all people on the ranges must follow.

And Mr. White at that time assured me that he was familiar with the practices, that is, the conduct, his conduct, proper conduct around ranges or around such duds; that he had been in the Seabees, and I believe he said he was familiar to a certain extent with, well, in the army term, demolition, referring chiefly to the demolishing of such projectiles.

However, I insisted that I must go through with my obligation and did explain to him that he was not to approach a dud or questionable missile within a safe range. I don't know—later I did publish, or earlier I published a distance [157] of five feet. Whether or not I told Mr. White that that distance was five feet, I don't recall. However, I requested that he mark the dud with warning flags that we would make available to him or pile stones near it, or some other marking that would be easily discernible, make a notation, mental or otherwise, of its location, and then inform myself or the provost marshal or Sgt. Hodges, my representative, immediately so that we could get the necessary demolition squads there to destroy the dud.

Earlier in the conversation I asked for Sgt. Hodges, had my secretary call the range house or range office and have him report to me. I do not re-

(Testimony of Robert S. Jones.)

call exactly at what phase of the conversation he came into the office, but when he did arrive I instructed him to take Mr. White to the areas he was interested in and assist him as best he could within the provisions of the Government, and reminded the sergeant that we could not employ our military personnel or equipment in order to assist him in his mission.

Q. In regard to those ranges and possibly duds, did you take any steps to warn the general public or any person of their presence? A. Yes, sir.

Q. What steps did you take?

A. Well, it was October, I believe, I called Mr. Shingle, the president of the Chamber of Commerce of Marysville, and told [158] him that as a result of a dud survey that I had personally conducted on the ranges, I had decided that it was dangerous to the public and asked him for his suggestions or recommendations as to what measures we could take to notify the public. Mr. Shingle suggested that we run an article in the Appeal Democrat newspaper of Marysville, which has the largest circulation, and simply describe to the public the conditions, and warn them, and also advise them that if they did have occasion to be out there, what operating procedure to follow in the event they discovered a questionable missile.

Also Mr. Shingle recommended that whereas we had leased parts of the ranges to the Cattlemen's Association, that I prepare memoranda to the cattlemen containing much the same as this newspaper

(Testimony of Robert S. Jones.)

article, which I did, and in view of the difficulty of my contacting the president of the Cattlemen's Association, being that he was out in the range most of the time, Mr. Shingle volunteered to act as my go-between and deliver the memoranda to him, which to my knowledge was accomplished.

Q. Captain, I hand you herewith Defendant's Exhibit B for identification and ask you, that is a War Department map, isn't it?

A. Yes, sir.

Q. And that is the area of the Camp Beale reservation, is that correct, at that time?

A. Yes, sir, that is. [159]

Q. What is this area lined in red?

A. The area with the red hachure represents an area de-dudded previously—well, as reported, I should say, in a report of 1944. You have that, I believe, in your records.

Q. Referring to report dated the 17th of October, 1944?

A. Yes, sir. This was prepared by Lt. Chipman, and the map was prepared evidently by the same officer and appended to this report.

Q. Is that all partly cultivated, is it grazing, or what? I am referring now to the time of the accident.

A. There was no cultivation on the land. The land was being used for grazing purposes. That was in October, 1946—portions of it.

Q. None of it was under cultivation?

(Testimony of Robert S. Jones.)

A. No, sir. Parts had been. They were small truck farms, a few; but, of course, they had not been touched since the Army had leased this property.

Q. Since the Army took it over during the war?

A. Yes, sir.

Mr. Scholz: I guess we had better mark this for identification, too, your Honor.

(The document referred to was thereupon marked Defendant's Exhibit C for identification.)

Q. (By Mr. Scholz): Were there any warning signs in that area, in the firing range area, warning the public? [160]

A. Yes, sir. At the approaches to the range area, that is, the main traveled approaches, other than trains, I would say——

Q. Would you mean crossroads or intersections or road junctions?

A. Not necessarily, but normally they all occur at road junctions, but signs were placed strategically at the chief entrances into the range area, large signs. I imagine they were about 8 by 10 feet, made out of heavy timber, permanent nature. As I recall, they had large red lettering, "Warning. Firing or Artillery Ranges—", something to that effect, advising the public to remain on the traveled portions of the road, not to leave the traveled portions of the road, and not to disturb any projectiles, to that effect. I don't remember the exact warning.

(Testimony of Robert S. Jones.)

Q. Could any person driving along those roads pass by without seeing those signs if they were looking?

Mr. Bloom: That calls for an opinion and conclusion of the witness.

The Court: Sustained.

Q. (By Mr. Scholz): Go ahead, Captain. Did I interrupt?

A. No, I was simply going to say we had not covered the small trails, for which there were a number entering, but the public didn't expect—we didn't expect them to use them. We covered the gravel and the permanent road leading in only. I can point out the location of three of them that I remember very well. [161]

Q. Where are those locations? Will you mark those with a little x?

A. I am not sure (indicating on diagram).

Q. That is the approximate location?

A. Those are approximate, yes. I remember that occasion quite well because as a result of our survey we discussed, as I indicated previously, the possibility of taking whatever measures were necessary to safeguard the public, and at that time the Executive Council took the matter under consideration and discussed with the engineer the proposition of making additional smaller signs and putting them at the trail entrances. However, they did modify the present system somewhat. They did not attempt to cover the trails, however, but at stages throughout the reservation—I mean throughout the

(Testimony of Robert S. Jones.)

range area—they would in those areas where we had found deposits of duds or the greatest impact areas, we would occasionally—the engineer would occasionally put a smaller sign.

Q. Speaking of those large signs, what type of lettering was there on there? I mean as to color and size.

A. As a recall, the signs closest to the area in question, it seems to me the word "Warning" was in red—I would say letters approximating a foot in height—and I believe the rest of the sign was in black. That is the best of my recollection. I passed that any number of times, but I didn't observe it in detail after the first examination. [162]

Q. Captain, will you mark on this map the approximate location of the area where this strafing range was located?

A. This, I might point out, is a map prepared by the engineers and it does not have the detail of the sketches that we use in our range work. But to the best of my recollection, it was in that approximate area.

Q. This is a small map. One inch on the map represents 62,500 inches on the ground.

A. Yes, sir.

Q. That is about a mile, roughly?

A. Right. There is a scale here on the map approximating an inch. The maps we used were over a yard—four or five feet in width.

Q. One to 5,000?

A. Yes, very small scale.

(Testimony of Robert S. Jones.)

Q. It was general knowledge that was all used as ranges out there, was it not?

Mr. Bloom: I did not understand the question.

Q. (By Mr. Scholz): It is a matter of general knowledge that those were used as ranges out there?

Mr. Bloom: I will object to that on the ground it calls for the opinion and conclusion of the witness, what was general knowledge.

The Court: Yes.

Mr. Scholz: On a matter of general knowledge, I think you [163] can call for a conclusion.

The Court: The objection is sustained.

Q. (By Mr. Scholz): Captain, any duds that the Army knew about were marked, were they?

A. Yes, sir. I had prepared a directive on that as operations officer. As operations officer, I was responsible for the supervision over the range officer and as such, I put a directive out to the effect that anyone, regardless of capacity or authority to be on the ranges, that discovered a questionable missile would not approach that missile within five feet. They would mark it so that it could easily be identified, preferably seen from the approach, roadway. They would then make a notation of its location and immediately report it to myself or to the provost marshal.

Mr. Bloom: If your Honor please, I now make a motion to strike the last question on the ground that the directive itself would be the best evidence, and on the further ground that there is an order to pro-

(Testimony of Robert S. Jones.)

duce documents respecting the directive included and the same has not been produced.

Mr. Scholz: If your Honor please, we haven't got that. I will read into the record here a letter which I received from the Attorney General.

The Court: Show it to counsel.

Mr. Scholz: Enclosed is a copy from the Assistant Judge Advocate General. He said that a thorough search of the [164] records of Camp Beale at the Kansas City Record Center, Kansas City, Missouri, had been made, and it failed to disclose any record of treatment, report of injury or investigation pertaining to the injury of the plaintiff in this case, nor do the retained records at Camp Beale on file at that area depot. We have done all we could. I have written back there several times and it is obvious. There were ten million people in the Army during the war, and there are tons and tons of records that go by there, and we do not know where it is. I think I can testify to that.

Mr. Bloom: The purport of that letter, as I understand, is there is no such document in question. Search has been made and there has none been found. If it is not in existence, I do not see how testimony can be made with respect to it.

Mr. Scholz: It said, "Thorough search fails to disclose any records of these."

Mr. Bloom: I believe the cases hold, if your Honor please, on these motions to produce that the Government and the Army in particular, is in the same position as a private litigant in so far as the

(Testimony of Robert S. Jones.)

production of records is concerned, and this is particularly true in a case of this kind where the injured party is more or less dependent upon information solely in the custody and possession of the Government and the Army.

The Court: While it is true the United States Government [165] is a private litigant ordinarily, we have in mind also that in a wartime program the records are very voluminous, even beyond the scope of the imagination of a person. The records were not microfilmed or anything of that nature.

The Witness: Not records of that nature, no, sir.

The Court: They would not be retained in the War Department because that would not reflect statistical information on the personnel.

Mr. Bloom: Yes. I would like to make one inquiry. It was my belief that whenever an accident of this kind occurred on a military installation there was an immediate inquiry by a board of inquiry, and that any pertinent documents were taken out.

The Court: Ask the captain on that score whether a board was convened and a finding made.

Mr. Bloom: Yes. Does your Honor wish me to interrogate him?

The Court: You might ask him.

Q. (By Mr. Bloom): Was such an investigation made, Captain? A. Yes.

Q. And wasn't an investigative file assembled?

A. Yes, it was.

(Testimony of Robert S. Jones.)

Q. And weren't these records made a part of that investigative file?

A. Well, I think I know the information that you wish, and I think I can explain to your satisfaction what records may [166] exist at this time. I personally either destroyed or supervised the disposition of all of the range records and the operations records. There is one record that may be instrumental to the case and that is the report that I personally submitted at the request of the chief of engineers prior to the disposition or, you might say, upon the declaration of Camp Beale as a surplus installation. This dud survey I mentioned I made in conjunction with this report, and I appended to my report not only copies of the report entered—I believe it has been accepted as evidence—but also my own maps designating the areas that had been de-dudded, the number of times they had been de-dudded and so forth, and the approximate number of duds remaining at each place. That report we tendered to the chief engineers and of course what disposition has been made of it since I do not know.

Q. It became a part, did it not, the originals or copies thereof, of the investigative file of this case?

Mr. Scholz: I will say this. I have the report of the investigation here which I was going to offer in evidence.

The Witness: The report of investigation we did —I recommended, and it was concurred upon that we should make formal investigation of the incident, in view of the fact that a military man had

(Testimony of Robert S. Jones.)

been injured, and that the injury had taken place on a military establishment. Therefore the investigating officer—I believe it was Captain [167] Sullivan—instigated a formal investigation, at which time he obtained these sworn statements of myself and these other people concerned.

Q. My question is, are the records which you alluded to or copies thereof a part of that investigative file?

A. I don't remember. The Captain, Captain Sullivan, did show me the final prepared investigation, which I reviewed, more for my own information than my official capacity, but I do not recollect that he had reports of de-dudding in that. He may have.

Q. I take it, your testimony is you do know that those records, including this de-dudding rendered, were forwarded to the chief engineers, but you do not know what happened to it thereafter, is that correct?

A. Well, the report pertaining to the de-dudding operations, yes, that report did go to the chief engineers. The report of investigation following the accident, I do not know whether that went in or not. I do not believe any action was taken based upon the investigation. The report may have gone to headquarters, Sixth Army. It was not in my prerogative.

Q. But you examined the investigative file?

A. Yes, sir.

(Testimony of Robert S. Jones.)

Q. Your testimony is you do not remember what records were in it?

A. No, my testimony is to this extent, that I do not recall what de-dudding reports or range operational reports may have [168] been contained in it.

Q. Do you remember whether any de-dudding or decontamination reports were contained in that investigative file?

Mr. Scholz: I submit, your Honor, the best evidence is the investigating report itself, which I have here, less the affidavit, which I offered in evidence this morning.

The Court: The report may be marked for identification at this time. Counsel may look at it.

Mr. Bloom: Thank you, your Honor. My motion was predicated on the fact that perhaps this report would or should contain the reports in question.

The Witness: I might point out that my interest in reviewing that was simply to review the testimony given by the parties concerned. As I say, officially, it was not my prerogative, for that matter, to review the report. It was out of my hands.

(The document referred to was thereupon marked Defendant's Exhibit B for identification.)

Mr. Bloom: I understand your Honor will reserve your ruling?

The Court: Yes, I will give you an opportunity, not only to peruse the record but to make inquiry

(Testimony of Robert S. Jones)

on the subject of further records based upon what you may observe. Counsel, Mr. Scholz, may I address myself to you on the question of time? The captain here has to return to his present base [169] on the East Coast?

The Witness: South Dakota.

The Court: South Dakota. Do you think you can complete with the captain today?

Mr. Bloom: I should imagine so.

Mr. Scholz: I think so. The chief part of his testimony is in now. The other would be small things.

The Court: Do you have extended cross-examination?

Mr. Bloom: I do not anticipate so, your Honor. Do I understand the captain is your only witness?

Mr. Scholz: Yes. I told you we tried to get hold of Private Lang and could not locate him.

The Court: Where is the sergeant?

Mr. Scholz: The sergeant left the army and the last I heard of him, your Honor—if there is any question about that, we may take his deposition—the last I heard of him, he is somewheres in Texas. He is out of the Army.

The Court: Have you located his whereabouts?

Mr. Scholz: I have his address, but I do not know whether he is there.

Mr. Bloom: Your Honor, a long time ago—as a matter of fact, years ago—I tried to locate these men to take their deposition and they could not be located at that time.

Mr. Scholz: I wrote you a letter——

(Testimony of Robert S. Jones.)

The Court: The sergeant is an important witness or would [170] be.

Mr. Bloom: We finally located him in Texas. We have an address. I do not know whether he is there yet or not. Captain Petrie we located in Sacramento. I served a subpoena on him and the return of the United States Marshal states that the deputy marshal endeavored to located Charles E. Petrie, 6660 35th Avenue, Sacramento, California, and was advised May 29, 1950, that Mr. Petrie had left a forwarding address in Washington. That was after we served the subpoena for the trial. We traced him to Los Angeles, we traced him to Philadelphia, and then we lost him. I associated Philadelphia counsel to take his deposition, your Honor, and he could not locate him. In other words, I think I made more than the ordinary effort to locate all these men to have them testify.

The Court: Have you availed yourself of the FBI in this connection?

Mr. Scholz: No, because we do not do that.

The Court: That service is available to you in these cases?

Mr. Scholz: Not unless we have exhausted—the FBI has certain duties, your Honor. When it is service connected like this, in a branch of the armed forces, they are supposed to do the investigating themselves. The FBI is not supposed to locate all these things. The Army has a method of locating through their files. [171]

(Testimony of Robert S. Jones.)

The Court: I mean as to individual witnesses and the interviewing of witnesses.

Mr. Scholz: We always go through the Army.

The Court: In tort liability cases I thought the United States Army had available the services of the FBI.

Mr. Scholz: They have under certain circumstances, depending on the amount and depending on whether or not they have exhausted these facilities they have.

The Court: You haven't any facilities available, so that would not be much to exhaust. You haven't any investigators.

Mr. Scholz: Not a single one.

The Court: That begs the question.

Mr. Scholz: No, I always make arrangements with the Army. On this last case we tried, we went through the Army. They go through to Washington and they locate the man. They are supposed to keep track of them until they are discharged, and then they have their last known address there. They check there, and when we have exhausted all possibilities, then we go to the FBI.

The Court: You might examine the captain.

Mr. Bloom: Are you finished?

Mr. Scholz: Yes. You go ahead if you wish. He is subject to recall.

Cross-Examination

By Mr. Bloom:

Q. Captain Jones, referring to [172] Defendant's Exhibit B for identification, would you please

(Testimony of Robert S. Jones.)

mark on this map, Captain, where the artillery ranges are located?

A. Do you have any particular caliber? They fired 105s, 155s, 70 caliber.

Q. Let us start with 105s.

A. Most of the mortar fire, the flat trajectory fire, was generally to the northeast. Here you have Sugarloaf Mountain. This broken line represents the extremity of the reservation. Depending on the range of these weapons, their fire existence was established. That fixed the fire. However, they had problems during which time they would actually move these pieces from one point to another, but generally they fired them to the northeast up in this region here (indicating). This was probably the greatest impact area for the heavy caliber artillery.

Q. Would you mark that heavy impact area with the letter "A"?

The Court: Use a colored pencil. "A" is the heaviest impact area shown in a northeasterly direction.

The Witness: Before I do that, may I also point out to you that heavy caliber firing was also directed in this portion of the range here, from firing positions in this region?

Q. (By Mr. Bloom): Will you first mark the heaviest impact area "A" and this other impact area "B"?

A. Yes. I want to be frank with you. Based

(Testimony of Robert S. Jones.)

on my survey I found the greatest number of duds existed in this area. [173]

The Court: Greatest number of what?

A. Duds.

Q. In the area?

A. In the area. Hoowever, I understood the greatest amount of firing was done in this area. However, that may be due to the fact that they were shooting at a smaller target here.

Q. Would the nature of the terrain have a great deal to do with duds? A. Yes, sir.

Q. Soft as compared with hard area?

A. Yes. I might point out that there is an ordnance man here, or was, who is better qualified than I to give you that detail.

Q. At least for the time being "A" would connote the point of impact representing the heavier—— A. Heavier calibrated.

Q. The heavier caliber? A. Yes, sir.

Q. And "B" would also be heavy caliber.

A. That is 105 you referred to?

A. The 70 mm. rifles, particularly in this region here. Actually, that is based on my recollection of these firing reports.

Q. (By Mr. Bloom): Were there any other concentrated artillery impact areas that you [174] recall? A. The heavier caliber?

Q. Let us go to a lighter caliber.

A. Well, yes. Incidentally, this information I am giving you is based on what I actually found in the field in the way of unexploded missiles plus

(Testimony of Robert S. Jones.)

what little information my file disclosed. As I stated earlier, the organizations usually handle those records within themselves and much of this information was based on what Sgt. Hodges, who had been in the range office for three years previously, had accounted to me. Back down to this area here, where we have the moving through range, there was a great deal of 37s fired. However, most of it, as has been brought out, was that armor-piercing type. I understand they fired a great deal of tracer along with the armor-piercing.

Q. There would be no explosive?

A. No, it would usually be expended by the time it hit the ground; nothing explosive, unless they developed a projectile that I am not familiar with later on. You are not interested, I believe, in the flat trajectory small arms, such as 30 or 50 caliber. They did not shoot the explosive projectiles outside of rifles. They even had the solid projectile or the phosphorus type projectiles, phosphorus type being simply to designate their fire so they could observe their firing, their impact. Also in this area, apparently from what I discovered, found, they had been fighting a few problems where they used [175] 60 and 80 mm. mortar, which is a curved trajectory shell.

Q. When did you discover that?

A. That was during my survey in October of that year. About in October I took details of men out and we spent over a week, ten days, or maybe better, covering each one of the impact areas in

(Testimony of Robert S. Jones.)

air skirmishes similar to the de-dudding operation previously.

Q. This mortar fire, where was that impact area?

A. Well, the mortars that I found were apparently fired during problems, at which time they simulated combat and they moved in. You will note here we have a crossroads called Waldo. As I recall, Waldo was a mock-German town being defended by German forces, either represented by our own or in imagination, and the problems would usually be fought from various directions in to Waldo or this general area here.

Q. Would you mind marking that so on your map?

A. Frankly, we were not too interested in surveying that particular locality because there was no concentrated position firing done there.

The Court: That was an approach area?

A. Yes. We referred to it as combat range.

Q. (By Mr. Bloom): Does that, then, constitute the main artillery impact areas?

A. As I recollect. However, I wish I could give you more detail and a more accurate idea of just what firing, types of [176] firing, and so forth, did take place, but it is difficult. I do know we have ranges where I would move army vehicles as units and they fired as we progressed, and they revamped these ranges many times. In fact, to my understanding, originally the Government had leased only a small portion of this range area and later added what is represented here.

(Testimony of Robert S. Jones.)

Q. But in any event, according to your survey and your best recollection, the areas in or around points A, B and C would indicate the principal impact areas, is that right?

A. Well, A and B would be the heavy caliber and so—well, I might say this entire region here we found mortar 37. They are actually infantry or were at that time infantry weapons used in conjunction—for the support of infantry and chiefly as an organic weapon.

Q. May I take a look at the map again? I think you stated you had an initial conversation with Mr. White some time in September of 1946 at your post range headquarters, is that right?

A. It was on or about that time, yes, sir.

Q. Did you have any maps of the area available at that time?

A. Yes, sir, posted just behind my desk.

Q. Were they maps like this or in more detail?

A. It was a much larger map, approximately five feet across. It was a tactical map, that is, a surveyor's map.

Q. You testified Mr. White on this initial occasion explained the type of metal, to use your words, very clearly that he was [177] interested in, is that true?

A. To my satisfaction, yes, to the extent that I was impressed that he was not interested in the iron projectiles.

Q. You understood, did you not, that he was not interested in ferrous metals?

(Testimony of Robert S. Jones.)

A. My conclusion was to the effect that he was interested in brass casings primarily.

Q. It is a fact, is it not, that in all the artillery impact areas that you have designated, the metals are, for the most part, iron or ferrous metals?

A. Yes.

Mr. Bloom: I believe there is on file answers to interrogatories propounded to the witness. If your Honor please, I would like to use them at this time.

The Court: Yes, you may use them. Here is the file. You might show the captain the answers.

Mr. Bloom: You see, the original apparently is not on file.

Q. As a matter of fact, Mr. White told you at this time, did he not, that he was not interested in the artillery ranges or the artillery impact areas for that reason, isn't that the fact?

A. Well, that was my opinion at the time. I don't remember exactly what his statement was, but I arrived at that opinion. I do remember I volunteered to have my sergeant take him, [178] however, to any range that he desired to see.

Q. I take it, then, from the conversation and the words that passed between you, you understood he was not interested in the artillery impact areas, is that correct? A. Yes, sir.

Q. Referring to the second conversation which you testified you had on or about November 18th, 1946, with Mr. White in talking about his demolition experiences as a Seabee in Saipan, you under-

(Testimony of Robert S. Jones.)

stood, did you not, that they referred to the activities of the C.B.'s in the demolition of structures or buildings? [179]

A. No, it was my opinion at that time—of course, I am familiar with the military association of the word "demolition," and it was my opinion at the time that he suggested it was not necessary for me to discuss his conduct around on ranges possibly contaminated, that is, areas where duds might exist.

Q. At that time, I take it——

Mr. Scholz: Let him finish his answer.

Mr. Bloom: I thought he was finished.

The Witness: It was an assumption on my part at the time when he mentioned demolitions, that he was referring to demolition in the sense of the word that we use it.

Q. (By Mr. Bloom): And you made that assumption because that is the way it was used in the Army?

A. Yes, and it was applicable to the conversation—I mean the trend of conversation, to my way of thinking.

Q. At that time you did not know what the procedures or practices of the CB's were?

A. No, I did not.

Q. You did not know what the term "demolition" meant in the CB parlance, I take it?

A. No.

Q. So that your conclusion was based upon your own terminology? A. True.

(Testimony of Robert S. Jones.)

Q. Isn't it a fact, Captain, that in the Army and in the [180] Air Force personnel that is off duty is permitted to engage in private employment on home bases or in areas adjacent to home bases?

Mr. Scholz: Just a minute. That is assuming something in evidence, that they are off duty.

The Court: Overruled.

The Witness: But I might make several statements that would be applicable to your question. One, for instance, normally during that time anyway personnel were not allowed to engage in private enterprise, of course, with reference to activities off the installation. If they were injured while so engaged, the Government was not liable for their, well, medical expenses, and so forth. We considered it not in line of duty.

Q. (By Mr. Bloom): I understand that, but you know it was common practice for personnel off duty to engage in private employment, do you not?

A. Yes, I agree with you, because as public relations officer at the time I had many labor unions complaining that they discovered soldiers working here and there, and, of course, I naturally had to turn it over to the Provost Marshal and recommend to him that the men have the law clarified to them and that they sever their employment.

Q. But they were not forbidden from engaging in private employment, were they? [181]

A. Well, I am frankly not a personnel man. I make my statements based on my experience in conjunction with the——

(Testimony of Robert S. Jones.)

Q. So far as your experience is concerned, did you know of any directive to personnel to the effect that they could not engage in private employment when off duty?

The Court: The fact of the matter is they were engaged in private employment.

Mr. Bloom: Yes, with the knowledge, I submit, of the Superior Officer.

Mr. Scholz: Oh, no, the Captain testified he had no knowledge. In fact, the Captain told him they could not be employed.

The Court: All right.

The Witness: Whether it was regulation or policy I do not know, but at that particular installation it was assumed not to be permissible, unless the commanding general as such, through his arrangement with, say, an employer, for the purpose of the war effort—such as picking the rotting fruit on the trees—permitted the men to work.

Q. (By Mr. Bloom): But you do not know, in answer to my question, of any directive forbidding any such private employment, do you?

A. No, specifically, no.

Q. You state you supervised a survey of the ranges near the time of the accident. Can you tell us when that survey [182] was conducted?

A. As I recollect, it was during the month of October, 1946.

Q. Will you tell us what the nature of that survey was and how it was conducted?

A. Yes. When the commanding general of the

(Testimony of Robert S. Jones.)

installation received information from Washington that Camp Beale had been designated to become surplus, we had a commitment to the district engineer with regard to the status of our ranges. He desired to know whether they had been de-dudded in conformity with the applicable circular. I do not recall the circular offhand. My records indicated that they had been. However, being *nearly* around as range officer, and having from time to time discovered duds, felt that I should personally ascertain the degree, the actual degree that the de-dudding had been accomplished. Now, many of those duds have been washed through the last two or three years since the firing had ceased by rain, wind, kicked up by cattle, and they were being reported occasionally. Therefore, with the commanding general's permission and at his directive, I took details of men which I had obtained from the post operating company or the military police barracks or wherever I could get them, took them out to those areas that my records indicated as the most probable impact areas, formed the men in a line skirmish, with the line dependent on the terrain, and we moved as a body over these areas and marked the duds [183] as we came to them, and marked them on our overlay for later disposition.

Q. Did you use any mechanical or electrical equipment in the location of any of these duds?

A. No, we discussed the feasibility, however.

Q. Did you depend solely on your eyesight as you walked over the ranges?

(Testimony of Robert S. Jones.)

A. According to the circular that the original de-dudding operation had been based on, that fulfilled the requirements.

Q. You refer to the circular in evidence in this case, Circular 195?

A. I would have to see this report of 1944. It is quoted in there, I believe, or my report submitted in 1946.

Q. I submit to you Plaintiff's Exhibit No. 12 and I will ask you if that is the de-dudding circular you have reference to.

A. I believe it is. However, my survey was not made in accordance with any regulations.

Q. I thought you just testified that your operations were made and your procedure was pursuant to this circular?

A. May I clarify that? My intention was to explain that our plan of operation was similar to the operation employed in the de-dudding program in 1944.

Q. Was there anything contained in that circular which indicates that you should not, or advised not to use mechanical [184] or electrical equipment to locate metallic duds?

A. We discussed the feasibility of using scientific instruments, but it was our discretion. That was in the discretion of the district engineer, because we had no such equipment organically, and we had no personnel so qualified to use it.

Q. You are familiar with the fact that such scientific instrumentalities existing are used?

(Testimony of Robert S. Jones.)

A. Certainly.

Q. But they were not used in this instance?

A. It was impracticable for us to use such instruments. I might add it probably would have cost many, many thousands of dollars to have mathematically covered those impact areas with such instruments.

Q. Aside from the cost, there is nothing in science or in nature that would prevent such methods being used or such machinery being used, is there?

A. No, but offhand I would venture to state from my recollection of the regulations that if the land was to be used—I mean to be placed on sale, leased or used for cultivation and building, it may or may not have been warranted, depending upon that particular situation.

Q. You say that that is also contained in this circular? A. No, sir.

Q. You referred to a regulation. What regulation do you now refer to?

A. I refer to no regulation or circular. I was simply [185] venturing information based on my experience and recollection of the regulations I have seen in the past. I do not know whether they were in the form of circulars, directives, or what the nature of them was, but naturally at the time I investigated any and all directives that might pertain to the surplussing of those ranges. And we even took the matter up before the Executive Council, and at that time it was the decision of the coun-

(Testimony of Robert S. Jones.)

cil and it was not our decision. It rested upon the chief engineers. We could recommend such action, but that was the limit of our authority or interest.

Q. And the chief engineer did not so recommend?

A. No. I did not see his reply to the letter presented, but as I remember from the discussion, later discussion, it was not feasible due to the cost, and furthermore to the fact that the land was adjudged grazing land, primarily for grazing purposes, of little value for cultivation.

Q. It was known at that time that the Army was entering into a contract for the collection of scrap metal in that area, was it not?

A. Yes, we knew that bids were being let for scrap metal.

Q. I show you a copy of your response or answers to interrogatories propounded by the plaintiff, and I call your particular attention to the twelfth interrogatory, which refers back to the eleventh interrogatory, the eleventh interrogatory being, "Was any warning of danger given by any [186] Army officer or other Army personnel to the plaintiff prior to his entry on said strafing range at Camp Beale on November 22nd, 1946?"

And the answer is, "Yes."

You remember giving that answer, do you not, in this sworn statement? A. Yes, that is true.

Q. Calling your attention now to the twelfth interrogatory, which reads, "If your answer to Question 11 is in the affirmative, then give the

(Testimony of Robert S. Jones.)

name or names of the officers or armed personnel giving such instructions and the precise nature of the instructions or warning, if any, given."

And in response to that I will ask you if you did not then make the following answer under oath to that interrogatory,

> "A. I, Robert Sumner Jones, at the time Captain A. C. attached AWS as post range officer instructed Mr. John Phillip White, the plaintiff, that in all probability duds existed in the artillery impact areas and areas adjacent thereto."

Is that the answer that you gave?

A. In effect, yes.

The Court: Counsel and Captain, it is quite evident that you will be quite some time.

Mr. Bloom: It is a little longer than [187] anticipated.

The Court: It is now getting close to four o'clock. I have a meeting scheduled in the American Can case which will probably run me to six or seven. I suggest that we stand over to Monday.

Mr. Bloom: Very well, your Honor.

> (Thereupon an adjournment was taken until Monday, November 6, 1950, at 10 o'clock a.m.) [187-A]

(Testimony of Robert S. Jones.)

November 6, 1950

The Clerk: John Phillip White vs. United States of America, on trial.

Mr. Bloom: If your Honor please, pursuant to the permission heretofore granted, I offer for filing Claim of Lien of the Industrial Indemnity Company.

Captain Jones, please.

Sumner Jones, resumed the stand, having been previously sworn.

The Clerk: Permit me to inform you, you have been heretofore sworn and you are still under oath.

The Court: All right, sir.

Cross-Examination
(Continued)

By Mr. Bloom:

Q. Captain Jones, I believe that on Friday you testified that certain signs were posted at the Camp Beal Military Reservation to the effect that the public was warned to stay on the travelled roads?

A. That is correct.

Q. Is that correct? A. That is correct.

Q. I take it that that was the substance of the warning contained on the signs you have referred to?

Mr. Scholz: You mean the substance, just the substance of what you're saying now?

Mr. Bloom: I think the question is clear. [2*]

The Court: Yes, I think so, Captain. The Captain may answer.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Robert S. Jones.)

A. No, I don't believe that was the substance. That was a modification, you might say, of the warning, the sign stating in effect, warning entering upon firing ranges, and then that later simply, I believe, a modification—at least that was my opinion.

Q. I see; but in any event would your present explanation, that in substance is what these signs you referred to contains, is that right?

A. Well, a notification that one was entering upon a firing range.

Q. I see. Now, do you have any photographs of these signs or copies of them?

A. No; however I might suggest that they may still possibly exist on the reservation.

Q. You don't know——

A. I do not know, not having visited the reservation, oh, since a few months after they closed the installation.

Q. The investigative file to your knowledge, doesn't contain any replicas or duplicates or photographs of any of these signs?

A. I do not believe——

Mr. Scholz: I suggest that the investigating file has been offered for identification, these may be shown to the Captain to refresh his memory, or refer to the report. [3]

Mr. Bloom: Well, I have no objection to his looking through to see if there is any replicas there. That is "D" for identification.

(Testimony of Robert S. Jones.)

Q. Just look through here and see if you find any photographs or any copies of any signs?

A. I do not.

Q. Did you supervise the placement of any of these signs that you refer to?

A. No, sir, the signs existed at the time I took over my duties, the signs I refer to.

Q. Do you know how far apart these signs were?

A. They weren't placed with the thought of interval, but simply placed at those strategic points of entry into the range areas.

Q. I see. You wouldn't know if there were any particular signs in front of any particular range area, I take it?

A. Not at the time in question, no; I don't believe so.

Q. Now, Captain, did I understand that in the normal operations of the Post firing ranges and in the routine of your office as Post Range Officer, that you periodically received reports of duds or unexploded shells on the various ranges, is that correct? A. That is true.

Q. And in response to these reports is it your testimony that you forthwith sent a detail out there to have the shells exploded or removed from the ranges, is that right?

A. In substance, but may I explain that upon receipt of the [4] notification of the existence of duds, I would apply a buck slip, so-called, or an inter-office memo to the communication requesting the ordnance demolition people, notifying them of

(Testimony of Robert S. Jones.)

this situation, requesting that they send their team out to dispose of it.

Q. The especially trained squads, is that right?

A. True.

Q. And I take it that until the shells have been detonated or otherwise safely disposed of that nobody was permitted to go out on the ranges, isn't that correct?

A. No, not in substance. If we received notification that anybody would have cause to be on a particular range, we naturally informed them of the existence of the dud, its location, et cetera, but to insure that they knew it was there and would not approach it.

Q. Well now, Captain, you would not permit a civilian, would you, to go out on a range where there were marked duds that you knew about?

A. Not unless I assured myself that he knew the presence of the duds and their locations and had been forewarned not to approach them.

Q. But if you gave him that warning and then you considered it perfectly safe to permit a civilian to wander around the range in question, is that right?

A. Well, inasmuch as it was my responsibility, that is my [5] responsibility for any incident on the ranges, naturally I always assured to my satisfaction that they knew of those duds. I believe that has been brought out by token of the fact that we, you might say, used extraordinary measures to warn the public that duds did exist.

(Testimony of Robert S. Jones.)

Q. Now, in reference to the strafing area which has been designated as the area between the targets and target finders on Plaintiff's Exhibit Number 11, this diagram, you knew, Captain Jones, did you not, before the date of this accident that there were unexploded duds on that strafing range?

A. I assumed that there may be duds. However, I knew of no duds in particular existing on that range, any dud that had been called to my attention we had taken care of in accordance with our standard operating procedure.

Q. Now, you heard the testimony—you were in the courtroom and you heard the testimony that Sergeant Hodges, amongst others, told——

Mr. Scholz: I don't think Sergeant Hodges testified.

Mr. Bloom: Well, the testimony is to this effect——

Mr. Scholz: Well, that was the statement, that was the testimony of Mr. White, not Mr. Hodges, Sergeant Hodges.

Q. (By Mr. Bloom): You knew, did you not, that—you heard the testimony, did you not, to the effect that Sergeant Hodges told Mr. White of the existence of a marked dud on the strafing range; didn't you know about that? [6]

A. I heard testimony to that effect, yes.

Q. Well, hadn't you received any report prior

(Testimony of Robert S. Jones.)

to the time White went on that range that that marked dud was on that range?

A. I had not.

Q. Well, did you receive any report after the accident to the effect that that marked dud was on the field?

A. I do not recall of such report, no.

Q. Now, to refresh your recollection, Captain Jones, I show you a memorandum which is attested to be a true copy by Captain Frederick C. Sullivan, memorandum to: Post Range Officer, attention Captain R. S. Jones, which is dated November 29, 1946, and I will ask you if you ever received this memorandum in your office?

Mr. Scholz: I object to it, that was after the accident.

Mr. Bloom: Well——

The Court: Overruled.

A. Yes, I did receive this memorandum.

Q. (By Mr. Bloom): You now recall receiving it? A. Yes.

Mr. Bloom: Your Honor please, I offer in evidence this memorandum as Plaintiff's Exhibit next in order.

The Court: What is the nature of it?

Mr. Bloom: This is the memorandum, subject: Demolition of Dud. A memorandum to Post Range Office, attention Captain [7] R. S. Jones.

"1. The following dud has been located and marked by danger flag awaiting disposition by demolition technician.

(Testimony of Robert S. Jones.)

"a. 1 61 mm. mortar shell approximately 100 yards north of signal tower on strafing range.

"2. Demolition technician should contact post operations or range office to be guided to dud. Signed Technical Sergeant Frank C. Hodges, Range Sergeant."

The Court: It may be marked in evidence.

The Clerk: Plaintiff's Exhibit 13.

(Whereupon the memorandum dated 29 November 1946, above referred to, was received in evidence as Plaintiff's Exhibit 13.)

Mr. Scholz: That is part of the report of the Claim's Officer, isn't it?

Mr. Bloom: I don't know, it is a paper which was handed to me along with a group of other papers.

Mr. Scholtz: Stipulated it came from the report here, Defendant's Exhibit "D" for identification.

Mr. Bloom: Pardon?

Mr. Scholz: It will be stipulated it came from the report which the United States Attorney's office, referred from the headquarters, 5th Army, Defendant's Exhibit "D" for identification.

Mr. Bloom: I don't know, it is a paper I got out of— [8] attached to this letter, if Your Honor please.

The Court: Well, is that the fact, is it?

Mr. Scholz: Sure. It shows in here, I mean——

The Court: That may reflect itself in the record.

Mr. Scholz: Yes, it is.

(Testimony of Robert S. Jones.)

Q. (By Mr. Bloom): Now, I show you, Captain, a similar——

Mr. Scholz: Defendant's Exhibit "K," report to Captain Jones, Range Officer.

The Court: All right, sir.

Q. (By Mr. Bloom): I now show you a memorandum of the same kind and character dated December 4, 1946, and I will ask you if you received that memorandum on or about the date it bears?

A. I did.

Mr. Bloom: I offer this in evidence as Plaintiff's Exhibit next in order.

The Court: It may be marked.

Mr. Bloom: Subject demolition of duds.

"1. The following duds have been found on our strafing range and are marked with danger flags:

"a. Five 37 mm. duds

"One 75 mm.

"One small practice bomb

"One 61 mm. motor dud.

"2. These duds should be destroyed by a demolition technician as soon as possible. He will be guided to duds [9] by one of the range personnel. Signed Frank C. Hodges."

The Court: In point of time, Captain, these reports were received after the incident in question?

The Witness: Yes, sir.

Q. (By Mr. Bloom): Now, as I understood it, Captain, you made a survey of the ranges sometime during the month of October, is that correct?

(Testimony of Robert S. Jones.)

A. That is correct.

Q. Of 1946——

The Clerk: Plaintiff's Exhibit 14 in evidence.

(Whereupon the memorandum above referred to, marked Plaintiff's Exhibit 14, was received in evidence.)

Q. (By Mr. Bloom): Your survey included, did it, the area which we have called the strafing range on Plaintiff's Exhibit number 11?

A. May I see that map of the camp once more, the installation, I believe it is.

(Witness looking at map.)

As I recall, we operated in that sector. Whether or not we actually covered the portion in question, I do not know. However, I might remind the Court that I believe the district engineer would have my map indicating the exact areas that we covered in this hasty survey.

Q. Well, I am asking you to resort to your best recollection. You know what we mean when we talk about the strafing range, [10] do you not?

A. Yes.

The Court: That is the range indicated on the diagram on the blackboard at the top, Captain, marked north, target and target finders.

The Witness: Is that a proportionate diagram, do you know?

Mr. Bloom: Yes. Well, the scale, Captain, is 200 feet to the inch, approximately.

(Testimony of Robert S. Jones.)

The Court: Will we complete this case by tomorrow morning?

Mr. Bloom: I am just finishing the cross-examination, I will be finished.

The Court: Mr. Scholz?

Mr. Scholz: I think we will finish today, if it doesn't take any more than 15 or 20 minutes we will finish it today.

The Court: Yes.

The Witness (at the blackboard): Would you assist me in locating the area on the map? I believe I have it located. We have the Wheatland Road coming in here (indicating), which is here and this road intersection bound on the nine and ten, apparently these are the two ranges.

Q. (By Mr. Bloom): Yes, the antitank ranges. I think that your x mark is pretty accurate.

A. I would venture to say that in all probability we did survey that, at least the northernmost portion of that range, the impact area, I should say, where we expected the 60 and 81 mm. mortar [11] shells to land.

Q. Well now, in inspecting this range did you find any duds or unexploded shells on the strafing range?

A. I do not recall, frankly. We covered thousands of square acres and that we had a small detail of men ranging from, say, 15 to 30 men, and we had a limited time to conduct the survey. We simply wanted an idea of the condition. We moved so rapidly making our survey on a daily report

(Testimony of Robert S. Jones.)

basis, later consolidating, that I would hesitate to make a remark to that effect.

Q. You would have to refer to this survey of yours, wouldn't you?

A. I would much prefer to refer to it inasmuch as it was accurate.

Q. We haven't got the survey. It is a fact, is it not, Captain, that you were surprised to learn that a marked dud had been permitted to remain out there on that field without your being advised of it, isn't that true?

A. You mean from what I have heard in the future—I mean, in past testimony, yes, that does surprise me.

Q. Aren't you surprised when you see now, even now this report that comes in from Sergeant Hodges?

A. No, I remember those reports well because at the time of the investigation the investigating officer asked for past records and at the time I explained we did not keep on file any record of those when they had been disposed of, that the [12] ordnance personnel received the original and for that matter he would have to contact them for copies. However, I did tell him that we had, he could get these two copies which were current which he appended to his file.

Q. Let us put it this way: You found out after the accident, didn't you, that there was a marked dud on that field at the time White entered it, isn't that right?

(Testimony of Robert S. Jones.)

A. I believe the date on that report was the 29th, wasn't it?

Q. Yes.

A. 29th of November and the accident occurred on the 22nd.

Q. But you found out from Sergeant Hodges or from some other source that when White went on the field that marked dud was out there, did you not?

A. I don't recall such a dud at the time. However, as far as I remember the dud in question in that report was discovered at a later date.

Q. Yes, but again I go back. You did find out, either verbally or otherwise, that there was a marked dud on the field that you hadn't been told about when White went out on the field, that is true, isn't it?

A. Referring to what I discovered, or what I heard at the time of the accident or what I have heard in the testimony?

Q. I am referring to what you found out after the accident at Camp Beal?

A. Well, from my recollection I did not receive an official [13] notification that such a dud did exist.

Q. Exactly, but you did find out that it in fact existed and was on the field, did you not?

Mr. Scholz: Already asked and answered, the subject matter, asked several times.

A. I don't recall that there was; that I did find out there was a dud outside of the one which exploded on the field at that time, no.

(Testimony of Robert S. Jones.)

Q. When you talked to Mr. Goldberg, you were surprised, were you not, that you hadn't been informed that there was a marked dud on the field; you remember that?

A. I recall during the interview with Mr. Goldberg that he did make a remark that he had seen a dud out there, yes.

Q. And you were surprised and angry, were you not, that your records did not disclose the presence of it?

A. Yes, I would have been. However,——

Q. Now, Captain——

Mr. Scholz: Let him finish.

Mr. Bloom: I thought he was.

The Witness: As I was going to say if the dud report dated the 29th had been submitted on that particular dud, it would seem irregular to me, because normally those reports were dated as of the date of discovery and I believe the gentleman came to see me the day after the accident.

Q. Yes, and you had no report at that time of the presence of [14] the marked dud?

A. No, I did not.

Q. All right. Now, in respect to your conversation with Mr. White, did you explain to Mr. White the fact that there had been no use of any scientific or electrical or mechanical equipment to locate duds on the strafing range?

A. I don't believe I made any remark to that effect to Mr. White, no.

Q. Did you inquire or make an examination of

(Testimony of Robert S. Jones.)

what his knowledge was of high explosive ammunition or the like?

A. No, I didn't make an entry to that extent.

Q. Did you show him any types or kinds of high explosives which he was likely to encounter on the strafing range in question?

A. No, I had no such shells in my office, but for that matter I had received his assurance that he had a familiarity with duds.

Q. You refer now to this talk about Saipan and the fact he was in the Seabees?

A. Yes, it was a remark to that effect.

Q. And now, concerning the condition of the strafing range and adjacent ranges at the time this accident occurred, would you tell us a little bit, Captain, about the condition of the terrain, specifically this is level country, is it, except for where this valley is indicated on the map? [15]

A. As I recall, the antitank ranges were on level, the firing points to the impact area were on level terrain, developing into slightly rolling land north of that point.

Q. Now, it is true, is it not, that this country is covered to a certain extent with grass?

A. Yes.

Q. It is true, is it not, that at the time of the year that this accident occurred, namely in November, of 1946, that that grass is fairly high in places?

A. Yes.

Q. It is true, is it not, that a visual inspection of that terrain would not, to the eye, reveal hidden

(Testimony of Robert S. Jones.)

missiles, exploded or unexploded, isn't that true?

A. It would limit one's ability to discover them, yes. It did hamper us in our work, I will make that remark.

Redirect Examination

By Mr. Scholz:

Q. Captain, there is no regulations violated that you, either as an individual or as a range officer, knew of?

Mr. Bloom: I didn't understand the question.

Mr. Scholz: Read the question.

(Question was read.)

Mr. Bloom: I will object to that as calling for the opinion and conclusion of the witness, namely, the word violation. [16]

The Court: What if any regulations were there in effect, you want that question?

Mr. Scholz: Yes, I want to show that any regulations that may have existed, there was no violation so far as he knew, either individually or as a range officer and coming within the purport——

The Court: Do you know of any regulations on the particular subject of demolition or detonation of duds, or directives or the like other than what may appear thus far in evidence?

The Witness: I am not aware, no, sir.

Q. (By Mr. Scholz): And you do not know as range—do you know whether—do you or do you not

(Testimony of Robert S. Jones.)

know if there was any violation of any—of any violation? A. Pertaining——

The Court: Sustain the objection to that question.

Q. (By Mr. Scholz): I believe you stated you had no knowledge of any duds not marked prior to the accident, is that correct?

A. That is correct.

Q. And then, referring to that map, if you wish, is that hill on the artillery fire, is that the impact area of the artillery that is up in the hill?

A. The heavy caliber artillery?

Q. Yes.

A. That was not an impact area for heavy caliber artillery.

Q. What was the impact area in the hills, what sort of firing? [17]

A. That particular impact area in question was impact for antitank weapons, such as 37 and bazooka may have been used, it was presumed that may have been. Also air-ground strafing which would be 30 or 50 caliber bullets.

Q. Would that be in the hills?

A. Well, that would be—I am speaking now of the area in question.

Q. Well, you have that map there? If I remember my map reading, Captain,—it has been a few years since I done it—the contour lines here show hills, I am referring to the—wait a minute, see how close these contour lines here are? A. Yes, sir.

Q. Show a high spot there? A. Yes, sir.

(Testimony of Robert S. Jones.)

Q. That is the closer those contour lines are, the steeper the grade? A. Yes, sir.

Q. And 50 feet, between 50 feet contour lines, that would be hills up here? A. Yes.

Q. That is what I am asking you, what impact area was that up where the hills are shown on the map and the hills on here, too (indicating)?

A. Well, of course the firing of the heavy caliber artillery was controlled by two things; one, the range of the projectile [18] the other the terrain. We had, depending upon the caliber of the artillery pieces, we had firing points back in this locality (indicating).

Q. That is where you fire from, the firing points?

A. From firing to an impact area to the west of Sugar Loaf Mountain.

Q. And the impact area is where the shell lands?

A. Yes.

Q. What was used there?

A. As I recollect 105 Howitzers and weapons of that caliber. They were fired generally from positions in a western sector into this general impact area. Now, we had a second impact area for heavy artillery fired from positions in the southwest area, in through here (indicating) to targets in the area I have designated as "B." That was primarily a 75 caliber, they need a much greater range than could be obtained along this firing shown here. Now, to my recollection those are the only two areas employed for heavy caliber artillery fire.

Q. All right.

(Testimony of Robert S. Jones.)

Mr. Scholz: Would you mark this for identification?

The Clerk: "E" for identification.

(Whereupon the document referred to, was marked Defendant's Exhibit "E" for identification.)

Q. (By Mr. Scholz): Captain, I hand you herewith Defendant's Exhibit "E" for identification and ask you do you know what [19] that is?

A. That is an armor piercing type shell, 37 millimeter.

Q. And I hand you herewith Plaintiff's Exhibit number 4, and ask you what that projectile is?

A. This is an H.E. orexplosive type projectile. It could be better identified if I could remove it from the casing, however, because of its structure, has a different butt.

Q. You can refer to it as the—you can tell the Court, that what I am particularly interested in is the case, I am particularly referring to what we call the projectile as distinguished from the shell. The shell is the whole thing, isn't it?

A. Yes, sir.

Q. This lower part is called the case?

A. Case.

Q. Case and the upper part is the projectile?

A. Projectile, sometimes referred to as shell.

Q. Referring to the projectile part of it, is there a difference between that and the Defendant's Exhibit——

(Testimony of Robert S. Jones.)

The Court: That was the armor piercing?

Q. The armor piercing, with particular reference to the kind of metal?

A. The armor piercing is made of steel, solid steel, to my recollection. The H.E. type has, it has got a fuse head.

Q. I mean, talking about the metal, now.

A. It is a fuse case, is aluminum alloy, it has got its primer, [20] detonater, and so forth within it. The lower part of the casing is a cast of mixed steel containing a powder explosive charge concealed within the casing. Here we have a bow-tailed area containing a core of phosphorous, or some other agent used for tracer, that core——

Q. That is tracer ammunition you have, then?

A. Well, as I recall all of the H.E. type had the tracer charge and that also is connected to the explosive chamber by a small powder corridor and in the event the fuse fails to detonate upon impact, normally a second or so later the phosphorous will have ignited the explosive charge.

Q. So if it didn't detonate on impact it would, the chances are very high it would go off anyway, is that what you mean?

A. Yes, sir. Very seldom would you have a dud normally and I believe it has been remarked by an ordnance expert that the duds are about one percent, conservative one percent may be duds.

The Court: What type of particular ammunition? This type?

A. This type, yes, sir, this particular shell, (in-

(Testimony of Robert S. Jones.)

dicating), which is—that is a pretty conservative odd in my opinion.

Q. Now, you say that was aluminum, that part, that projectile, would that oxidize or change if it was exposed to the air elements?

A. Yes, sir, I believe that it would take a dull grayish appearance and this shell would take a dark greenish appearance, [21] being brass, and of course the steel would rust.

Q. Now, what about the armor piercing, A.P.?

A. Well, being all steel it would rust. I have seen a number of those in the range house and they are very rusty, except, of course, for the rifling band—I forget what they call it, the bronze strip around them—I believe they are rifling bands. They would turn, I imagine, a dull green, such as copper would on oxidization. This seems to have a brass ring, this seems to be copper, or whatever that—I don't recall whether there is a particular identity between the two projectiles.

Mr. Scholz: That is all, Captain.

Mr. Bloom: One or two questions.

Re-Cross Examination

By Mr. Bloom:

Q. Now I show you again, Captain, Plaintiff's Exhibit number 14, which is this report from Frank C. Hodges, Range Sergeant, and I will ask you if it does not appear on this report that as of this date five 37 millimeter duds were located on the strafing range? A. Yes, it does so appear.

(Testimony of Robert S. Jones.)

Q. And when you went out on your own survey, Captain, didn't you find some 37 millimeter duds yourself?

A. As I recall we did find some 37 millimeter duds, but I don't recall where.

Q. You don't recall where, do you recall how many? [22]

A. No, I do not.

Mr. Bloom: That is all, thank you.

Mr. Scholz: That is all.

The Court: I have a couple of questions.

By The Court:

Q. Ordinarily, Captain, how much time would elapse under ordinary circumstances after a report of a dud was made to you, in the regular course of affairs, until such time as you would order or cause to be ordered or directed a demolition team to make its survey and consummate its objectives, how much time would elapse? Take the ordinary course of events.

A. On the average, sir, I would say from four to ten days, at most.

Q. And how far distant would this team be housed; where were they located?

A. That was the depending factor. They might, at the time, would be at Fort Ord.

Q. I see.

A. And the headquarters of the Sixth Army were in San Francisco.

Q. You didn't have such a team located under your immediate supervision or direction?

(Testimony of Robert S. Jones.)

A. No, sir, we had to request it through the Sixth Army Channels.

Q. Are they a highly specialized and trained team? A. Very highly. [23]

Q. And the hazards involved in their undertaking extremely great?

A. It is extremely hazardous. And may I point out there are some antipersonnel type bombs or shells that if not discovered to be such and a man not qualified attempted to remove the war head, just the slightest motion, unscrewing motion would blast it. They are designed for that purpose to eliminate curious people that attempt to take them apart.

Q. Is that service of a voluntary nature, are these men appointed or trained exclusively by reason of their background or particular technical knowledge?

A. Normally it is voluntary, because of the nature of the hazard. I might point out in our service, unlike most of the other services, most hazardous duties, such as submarine duty, paratroop duty, flight duty, is strictly voluntary.

Q. Now, on the unexploded dud which appears to be marked on the blackboard with an "x" to which reference has been made occasionally here in the course of this trial, did Mr. White, the plaintiff in this case, report to you or anyone under your supervision that he had re-marked that dud?

A. He did not report such fact to me. However, if he did mention it to my subordinates I did not hear of it. I had two men at that time assigned to range duties, Sergeant Hodges and Private Fuller.

(Testimony of Robert S. Jones.)

The Court: From the records available in this court, to [24] the best of your recollection how much time elapsed from the original notice, if any, given to you of that unexploded dud until its removal or detonation?

A. You're referring to the one in the report?

Q. Marked "x," marked "x" on the blackboard, on the diagram, rather, that is the one to which Mr. White made reference he re-marked by placing a monument around it of some kind.

A. Sir, to my recollection I don't recall that particular incident. I do recall that Mr. Goldberg remembered that he had seen a marked dud out there.

Q. Well, Sergeant Hodges would have some information on it? A. He may have had.

Q. Now, directing your attention particularly to the survey you made, what was the underlying purpose of that survey?

A. The district engineer, having attempted to determine the status of the ranges through, you might say, a routine letter, requesting whether or not the provisions of War Department Circular, I believe, 195, had been carried out. My report being in the affirmative, realizing that we had discovered duds from time to time, I did not want my report to reflect to him that no duds did exist. Therefore, I decided to make an actual physical survey of the impact areas, the greatest impact areas, to get an idea of the ratio of duds still existing, and at that time, upon completion of the survey, I recommended to the deputy commander that such duds and such

(Testimony of Robert S. Jones.)

ratio did exist [25] and recommended that he request the district engineer to send demolition squads to the ranges to decontaminate those particular areas evidencing the greatest number of explosive type duds.

Q. Were those squads sent there?

A. No, sir, as I recall the deputy did write the district engineer to that effect, and as I recall the engineer pointed out to him the tremendous expense involved in de-dudding those areas and why it was not contemplated these areas that would be used for cultivating or building, that it was not practicable to go to that extent.

Q. Do I understand then that assuming that in a given area that might be designated as the housing area, ultimately as a housing area, under such conditions, mindful you might have excavation work, you would have made a survey and the demolition squads would go in there, or is that right, before turning it over to the civilian populous?

A. That would be subject to the discretion of the district engineer, because he has to clear that property before it is sold or leased. That is the practice. However, if there is going to be any building they will send their demolition squads to the area to de-dud it. However, I do recall seeing in an engineer's letter or directive something to the effect that if after the engineer made his survey he decided the cost of de-dudding would be over a certain amount that he could offer the deduction of that amount from the sale value of the property. [26] Of course,

(Testimony of Robert S. Jones.)

that depended, I imagine—this is strictly my opinion—as to whether or not he had the personnel, the equipment at hand or thought it absolutely necessary morally to undertake that operation.

Q. Well now, you first met Mr. White in connection with your official duties and you made available to him such personnel as might afford him an opportunity to complete his work under the bid and precisely and specifically what conversation did you have with him concerning any hazard, if any, on the area to which he was going to direct his attention? Do you recall the specific conversation?

A. Sir, with reference to the earlier statement you made with regard to assistance?

Q. Yes.

A. I volunteered a guide to him, which was Sergeant Hodges. I did not volunteer any other personnel or equipment. During the conversation pertaining to probability of duds existing, I did explain to him, began to explain to him that being the firing range and impact area there were in all probability duds and that I must explain certain things to him. It was at that time when he assured me that he was familiar with demolitions, at least I gathered that he inferred that he was familiar with impact areas to a certain extent.

Q. At that time you had made a survey and the survey indicated there were duds? [27]

A. Yes, sir.

(Testimony of Robert S. Jones.)

Q. So that you were then thoroughly of the belief there were duds? A. Yes, sir.

Q. And you so informed him? A. Yes, sir.

Q. What, if any, response did he make, sir, to you?

A. He assured me he, having been in the Seabees and associated with demolition work, wasn't necessary for me to go into detail. However, I explained to him, that I appreciated that; however, I was morally obligated to go into detail, which I did.

The Court: I have no other questions.

Recross-Examination

By Mr. Bloom:

Q. According to the—do you recall that according to the answers to the interrogatories that you told Mr. White that there was a probability of duds on the artillery impact areas only, isn't that correct?

Mr. Scholz: I don't think he said that.

Mr. Bloom: Let us take a look at it.

The Court: It might answer it and look at the interrogatories and the answers he gave thereto.

The Witness: I would like to explain for clarification purposes that when we, as range personnel, refer to artillery ranges, we simply referred to the entire range, less the bayonet [28] or grenade ranges, which were in the proximity of the barracks areas or adjacent thereto. Otherwise, when we refer to artillery range we assume that it incorporated all of the range. I don't know what assumption Mr. White made.

(Testimony of Robert S. Jones.)

Q. You wouldn't know what assumption any civilian would make if you referred specifically to artillery impact areas, would you?

A. No, I wouldn't.

Q. No.

Mr. Scholz: Your Honor, please, I want to read that, in addition to the information given by the Captain, "that in all probability duds existed in the artillery impact area and areas adjacent thereto."

Q. (By Mr. Bloom): Now, referring to the map on which you marked the artillery impact areas, I now refer to Defendant's Exhibit "B" for identification, it is true, is it not, that the points which you have indicated are many miles away from the strafing area which you designated "x"?

A. Yes, that is true, "a" and "b" designations.

Mr. Scholz: Are you through?

Redirect Examination

By Mr. Scholz:

Q. Captain, looking at this map, what are the adjacent areas?

A. Reference to adjacent area in the report meant the area where a stray, a short could have landed. Now, whereas you're [29] firing over a great range with 75 millimeter, in this case if you had an imperfect projectile it could fire——

Q. Fall short?

A. Short or over to the right or left of the in-

(Testimony of Robert S. Jones.)

intended course. We have found shorts, I might point out, oh, four or five miles short of the target area. Therefore, we had to report that fact that a possibility in the report and——

Q. As I understand it in your interrogatories you refer to the artillery range and adjacent area and you meant the entire, the artillery range was the entire range and adjacent areas, that which might fall short from the impact range——

Mr. Scholz: I think the word "adjacent" is in common use and this does violence to it. I object to the explanation——

The Court: Sustained, unless it has some military parlance.

Mr. Scholz: That is right. When you refer to artillery range, you mean any range, that covers it, and down at Camp Book they have an artillery range that covers small arms and everything else, designated right on the map. I never heard it referred to otherwise, except it might be designated as small arms.

The Witness: For clarification—purposes for clarification all of the area outside of the cantonment areas were considered range land, that is, if the land is not being utilized for some other purpose other than firing. Now, to the north of that limit of the range was the actual boundary, even though [30] not indicated by the Hacktern section, to the west likewise, south likewise. But I might also add for clarification, we know of problems that have been

(Testimony of Robert S. Jones.)

fought upon this area covered by Hacktern; however, they were with small infantry weapons and generally fired blank ammunition at each other, at opposing forces.

Mr. Bloom: Your Honor, please, I am going to offer this map as Plaintiff's Exhibit next in order.

The Court: So ordered. Is it the Captain's report, his survey report?

Mr. Bloom: No, that is the one that he has been looking at.

Mr. Scholz: His particular survey report, no, we have been unable to find it, but the Captain indicates that possibly it might be over in the engineer's.

The Witness: I am of the opinion, Your Honor, that the engineer's office, in all probability, still have that inasmuch as——

Mr. Scholz: Over in Sausalito?

The Witness: It was made at Camp Beal.

Q. (By Mr. Scholz): You mean at Sausalito, the Chief of Engineers?

A. I believe his designation is Chief, Northern California. District Engineer. I believe that is the designation.

Q. Over at Sausalito?

A. I am not certain. [31]

Q. I am pretty sure it is. If it is over there we could get it.

A. It might be indicated on the copy of that letter of transmittal incorporated there.

Mr. Scholz: Your Honor want to continue that

(Testimony of Robert S. Jones.)

matter, I would write over and ask if they had it there? If they don't——

Mr. Bloom: Well, we asked for it, there was an order for all this data. The Captain tells us he couldn't locate it, he thought he saw it go into the investigative file, but he doesn't know what happened to it, he gave it to the Chief Engineer, but they made inquiry, and there is a letter from the Attorney General, I mean, the United States Attorney's office in Washington to the effect that they made an examination and can't find it.

The Witness: There is some misunderstanding, I beg your pardon. I didn't intend to leave you with the impression that I thought the original report may have gone to the investigative——

Q. (By Mr. Bloom): You said a copy you thought.

A. A copy, it was possible the original that did go.

Mr. Bloom: I didn't understand that, but in any event I think it would serve no purpose to try to find that document.

The Clerk: Plaintiff's Exhibit 15 in evidence.

(Whereupon the map above referred to, marked Plaintiff's Exhibit 15, was received in evidence.)

The Court: Captain, at least in the light of your survey, [32] you did make a finding, the finding was conveyed to the proper officials, through channels as you indicated?

(Testimony of Robert S. Jones.)

The Witness: No, sir, the result of my survey conducted by me was made known to Colonel Griffith, Deputy Commander. That was simply for his information.

The Court: I see.

Mr. Scholz: The report is offered here, if Your Honor please, Defendant's Exhibit "D," that was a report of investigation for identification, I will offer that in evidence.

Mr. Bloom: If Your Honor please, glancing through this report I see that there is—it is replete with incompetent material.

The Court: No doubt containing a great deal of hearsay.

Mr. Bloom: Hearsay.

The Court: It may be marked for identification and incorporated in the record herein. The objection is sustained to the inclusion of the whole record.

Mr. Scholz: The only thing is that the plaintiff has used that in cross-examination and——

The Court: You may use such other parts on cross-examination as you desire, if it be relevant.

Mr. Scholz: Thank you, Your Honor, I will do that, not from this witness.

The Court: It has been developed now through the Captain that subsequent to the incident, the accident in question, that [33] certain reports were made to the Captain. Now, you might explain those in the light of the record, any other explanatory matter that might be pertinent or relevant.

(Testimony of Robert S. Jones.)

Mr. Scholz: I don't think there is anything that indicates any change from the Captain's testimony, Your Honor. I mean, it would be just corroboration.

The Court: No question. The information which he obtained after the accident was information that he had before the accident. I mean, you didn't have specific knowledge, but over-all knowledge, is that right?

The Witness: Yes, sir.

Mr. Scholz: He had some knowledge of some duds and that he also warned White of those duds.

The Court: Did you mention to Mr. White the survey that had been made, based upon a survey that you indicated?

A. I do not recall, Your Honor, whether I did or not.

The Court: Would the ordinary pedestrian, civilian pedestrian walking through the area in question cause or tend to cause any unexploded shell or missile to explode under ordinary course of events, just walking through there, by kicking of the toe or otherwise molesting or disturbing the unexploded missile?

The Witness: Yes, sir, that is very possible. In fact, vibration, ground vibration in some instances have been known to detonate duds. It might be brought out that many of these duds have been laying there for over two or three years [34] and throughout that time, throughout the period of oxidation they would become very much armed or

(Testimony of Robert S. Jones.)

dangerous, the slightest disturbance is liable to explode them. That is not true in the majority of cases, however.

Mr. Scholz: Does that apply to A.P.?

A. No, sir, armor piercing projectiles have no explosive charge whatsoever, normally, though some are designed, the secondary explosive charge is designed to make an initial penetration and to explode upon secondary impact or time detonation.

The Court: By the way, where is Sergeant Hodges? Is he in the service?

Mr. Scholz: He is out of the service, Your Honor.

The Court: What was his last known employment, do you know?

Mr. Scholz: I don't know, the last information I got, some little while before the trial, that he was in Lott, Texas.

The Court: What kind of business is he engaged in?

Mr. Scholz: Didn't say, traced him down there. He had been discharged from the service, located him in Lott, Texas.

The Court: Is it possible to get his testimony?

Mr. Scholz: Yes, Your Honor.

The Court: His testimony would be very material, very pertinent.

The Witness: Relative to Sergeant Hodges, sir, if I may suggest, my capacity was more of a supervisory capacity; he actually physically operated the ranges and of course, as you [35] brought out by

(Testimony of Robert S. Jones.)

testimony was physically associated with Mr. White during his operation.

The Court: I would like very much to have the benefit of his testimony in this case, would aid me materially. The Captain pointed out his functions were supervisory. If it could be obtained, could it be obtained in deposition form?

Mr. Bloom: May I state this:——

The Court: I think you made or stated you made a great effort——

Mr. Bloom: And I made requests, first on Mr. Deasy who was the Assistant United States Attorney then handling the case, respecting Sergeant Hodges. Whether I specifically requested his testimony of Mr. Scholz, I do not recall. But in any event, inquiry was made as to the location and availability and while I appreciate that certainly anything helpful to Your Honor should be produced, it would seem to me that the Government has had many years to develop this testimony and I think that under the circumstances, in view of the fact that the case has been pending for such a great length of time and efforts were made along those directions, that the Government has had sufficient time within which to produce the strongest case.

Mr. Scholz: Your Honor please, the Government shouldn't be fined for the shortcomings of Assistant United States Attorneys. However, in regard to that I endeavored to locate all the witnesses, and that I got in communication back on [36] April 28, 1950, I advised Mr. Bloom of the fact that I had a letter

(Testimony of Robert S. Jones.)

from the Attorney General furnishing me with the address of the witnesses and of all of the witnesses and I asked him his desire as to what he wanted to do, if he wanted to take a deposition or not. Well, there was one he wanted to take a deposition of, Lange, and we traced him down to Los Angeles and then he left there and traced him back to Philadelphia and we sent back a stipulation to take his deposition back in Philadelphia, but when he found out that he had left there——

Mr. Bloom: That is right, I am not criticizing.

Mr. Scholz: We have done all I could. Simply, this is not the only case that I am handling and I advised him where they were located and so forth.

Mr. Bloom: That is right.

Mr. Scholz: Now, I didn't—frankly, I didn't think Sergeant Hodges was going to be a necessary witness, because I have Captain Jones' statements and I have also Sergeant Hodges' statement and I thought that would be adverse to the plaintiff and that it wouldn't be necessary to use it. However, the testimony of Mr. White was somewhat different from the statement of Hodges and that, of course, took me somewhat by surprise.

Now, we can take his deposition if the Court desires to. It is our desire to give the Court the information the Court wants to adjudicate this case, take his deposition, either on interrogatories, in a very short time, or a regular deposition. [37]

Mr. Bloom: I personally feel, if Your Honor please, that at this late date, in view of the fact

(Testimony of Robert S. Jones.)

that the Government knew of the existence, even the address of this particular witness, I feel that it would be unfair to try and develop testimony at this time. In that connection, very probably it would have to be done by deposition, would entail additional expense, which my client can't afford and I honestly don't think his deposition would develop anything particularly enlightening to the case because we can assume that if it is something in the line of duty that he should have done, that Sergeant Hodges will undoubtedly say that he did it.I mean, that would be a natural thing for anybody to say.

Mr. Scholz: I don't think Government witnesses work that way, Your Honor. We are interested in giving the Court the benefit of all of the actual facts, even if the case is against us, we have no objection to losing it, but we are interested in the facts being presented to the Court. I think whenever the Government produces a witness we vouch for him.

Mr. Bloom: Well, I just don't like to see further delay.

The Court: Mr. Bloom was merely pointing out the natural inclination of a person to protect themselves. You have an affidavit from Hodges or any statement?

Mr. Scholz: Yes, Your Honor, we have a sworn affidavit. That is in the file, the investigation file, sworn affidavits from Hodges and sworn affidavits from White—Lange and White, [38] too. We offered those.

The Court: Have you a copy?

(Testimony of Robert S. Jones.)

Mr. Bloom: I have examined those affidavits over the weekend, your Honor.

The Court: My only thought is in the interest of the trial of the case, always has been my purpose to obtain testimony that might be material and relevant. It seems to me the first witness in this case is Sergeant Hodges. I mean, he is the man actually on the terrain, was with Mr. White, they had conversations. The gentleman on the stand, of course, exercises supervisory control and so testified in detail as to his duties and the discharge thereof; Hodges was the man on the turf, so to speak. He was certainly more intimate in connection with Mr. White than this gentleman. And in a trial of a case I always sought to produce the vital, material testimony.

Mr. Bloom: If Your Honor please, what I am primarily thinking of is a case between private litigants and that under the Federal Tort Claims Act, that is what the Act does, it places the Government in the position of a private corporation, as a private litigant, had full opportunity and in this case unusual opportunity, investigative and otherwise, to produce evidence which might be beneficial to them in a case which had been pending for years.

The Court: Pardon me, Counsel, how long has this case been pending now? [39]

Mr. Bloom: About three years, now, I think, Your Honor. Three years. You see, it was originally designated as one of your cases and then thereafter the American Can litigation came up.

(Testimony of Robert S. Jones.)

The Court: That took me a year to try.

Mr. Bloom: Yes, and then it was put on Judge Lemmon. Judge Lemmon was endeavoring to assist with the calendar, it was continued on a number of occasions, four or five occasions, before Mr. Scholz got into the case, and then I believe Your Honor thereafter was—I think it was the Bridges' litigation thereafter that prevented it being heard, and as a consequence——

The Court: The other judges were trying cases here, Mr. Scholz; why is it this case came back here after this number of years?

Mr. Scholz: Your Honor, I didn't get this case until after Mr. Deasy resigned and then it came to me with about forty other cases, and I don't know.

The Court: Under the circumstances——

Mr. Scholz: Set for trial many times.

The Court: Well, under the circumstances then we will have to stand content on the record as it exists.

Mr. Scholz: That is all. Your Honor have any more questions you wish to ask?

The Court: No, sir.

Mr. Scholz: That is all. [40]

(Witness excused.)

Mr. Scholz: Your Honor please, I would like to ask Mr. White a few questions as an adverse witness.

JOHN PHILLIP WHITE,

the plaintiff in this action, called as an adverse witness on behalf of the Defendant, previously sworn.

The Clerk: You have heretofore been sworn and you are still under oath.

Direct Examination

By Mr. Scholz:

Q. Mr. White, when you were discharged from the Air Corps do you recall what your discharge certificate said?

Mr. Bloom: If Your Honor please,——

A. I don't recall.

Mr. Bloom: Just a moment.

The Court: What is the purpose?

Mr. Bloom: I can't see what purpose or relevancy it has unless you are trying to inject some collateral extraneous matter into the case. I don't know what he has reference to, even.

The Court: Can't see the relevancy.

Mr. Scholz: All right, Your Honor.

Q. Would the same apply if I asked him as to his discharge as a Seabee?

Mr. Bloom: Same objection. [41]

Mr. Scholz: The purpose, of course, is to show that he had knowledge of demolition. Now, I don't suppose he will say it.

The Court: Counsel, perhaps I am obtuse on this subject, but the question, what is the question?

(The question was read by the Reporter.)

The Court: As to what? Reasons for discharge?

(Testimony of John Phillip White.)

Mr. Scholz: No, the purpose, of course,—it is no good now—the purpose was, on these discharges, Your Honor, if they had particular qualifications they are listed, at least that is my understanding. I know it is in the Army.

The Court: If that be the purpose, certainly. If the discharge will show any particular qualification that may be relevant or material to his knowledge of demolition or high explosives. I will allow it.

Mr. Scholz: I don't know, that is what I might ask——

The Court: Ask him if he was honorably discharged or otherwise.

Mr. Scholz: Oh, no, I am not interested in that. Strike the question, because I know what the answer is going to be from the smile on the plaintiff's face.

Q. Have you got a copy of the Seabee's discharge there?

A. I have copies of both discharges.

Q. The Seabees may be different than the Army. I will pass that question for a minute and ask you a couple of other questions. Now, I believe you testified your contract permitted [42] you—where you were to work, is that correct?

A. Yes, the contract permitted me.

Q. And then when you decided, you went over to the M. P. barracks and procured the services of two or three men over there, is that correct?

A. Before going to work I secured the services of some of these men from the M. P. barracks.

(Testimony of John Phillip White.)

Q. And one of those was a Private Lange, do you recall? A. Yes.

Q. And now when you took them out did you tell them not to pick up any duds?

A. Yes. May I explain it——

The Court: Answer it in any way you wish.

The Witness: I explained to them that all I wanted was brass, to leave everything else alone.

Q. Yes. Now, referring to the affidavit of Lange in Defendant's Exhibit "D" for identification, he states that——

Mr. Bloom: Your Honor please, I believe that this is an improper use of hearsay evidence.

Mr. Scholz: I want to ask him if that is true.

Mr. Bloom: I still think it is improper, using hearsay evidence.

The Court: It is, yes; sustained.

Q. Then you told them also that they were not to pick up any iron, but all you were interested in was brass, is that correct? [43]

A. That is true.

Mr. Scholz: That is all. One more question. Your Honor, please, the interrogatories are here, I believe.

The Court: They should be on file, Counsel. I looked for them, will have them filed. The interrogatories, the answers, they are not in the file.

Mr. Bloom: The originals, they are not, your Honor.

The Court: I would like to have them on file.

Mr. Scholz: I don't know where they are.

(Testimony of John Phillip White.)

The Court: You can determine that——

Mr. Scholz: That is before I came into the case.

The Court: Mr. Clerk, will you make a note to be sure the originals are on file? Also, all these exhibits, including those for identification.

Mr. Scholz: Then those interrogatories will be read by your Honor, then?

The Court: Yes.

Mr. Scholz: One more question on that ground.

Q. In the interrogatories of Captain Petrie, he says, "I advised the plaintiff personally——"

Mr. Bloom: If your Honor please, I object to that on the grounds it is improper hearsay evidence. The fact that it is contained in the answers to the interrogatories doesn't render it any more competent as evidence.

The Court: This might be leading to a question. Let me [44] hear whatever it is.

Mr. Scholz: As I understand it, the interrogatories are in evidence.

Mr. Bloom: Interrogatories should be on file, not in evidence.

Mr. Scholz: Well, I will offer them in evidence now.

Mr. Bloom: Then I will object to their introduction.

Mr. Scholz: Should the Court rule on that?

The Court: You are offering a non-existent document; there is nothing before the Court.

Mr. Scholz: I will——

The Court: This record may be reviewed here-

(Testimony of John Phillip White.)

after and our great brethren in the Appellate Court are sometimes meticulous in their examination of our records and wonder sometimes what happens in the trial courts. Sometimes I think they wonder about our ineptitudes.

Mr. Scholz: Well, then, your Honor——

The Court: You see, I have to protect myself, not only against the Court of Appeals, but counsel as well and opposing counsel, and I am a hounded man, a hounded man.

Mr. Scholz: I appreciate your Honor's attitude, because I was in the Appellate Court this morning. I want to say this, your Honor: When and if the interrogatories are found, that if they are not found I have sworn copies here and I may offer them in evidence in lieu of the originals. [45]

The Court: Interrogatories of this gentleman?

Mr. Scholz: Interrogatories of Captain Petrie and Captain Jones.

Mr. Bloom: To which I object on the ground that the interrogatories should be on file, that they are not evidence as such, and that if they contain hearsay and they are offered in evidence, that it is proper to object on the ground. I don't think you waive any of those objections on the fact that answers come in by way of proposed answers to interrogatories.

Mr. Scholz: That is correct.

The Court: That is true. Counsel has indicated his objection and I may interpose that you couldn't offer the interrogatories wholesale just by the bland

(Testimony of John Phillip White.)

assertion that here are the interrogatories and answers; you couldn't offer them wholesale.

Mr. Scholz: Well, I would say this: These interrogatories were put on the request of the plaintiff and the witnesses in here—it is actually testimony and sworn statements and they are like a deposition, and in view of the fact that Captain Petrie is not here, it is a deposition, and is offered as admissible in evidence, and I offer——

The Court: Let us pause a moment, Mr. Scholz. You were addressing a question to this witness based upon an answer in Captain Petrie's interrogatory?

Mr. Scholz: That is right. [46]

The Court: Where are the originals of these documents, do you know?

Mr. Scholz: Well, I assume that they were filed, that they were filed with the Court.

The Court: Mr. Clerk, are they on file, any of these documents?

(Discussion between the Court and Clerk out of the hearing of the Reporter.)

The Court: I think what we better do is get the originals; they must be in existence. This matter may then remain open until you make the formal offer of these interrogatories, and make our record on it. I wouldn't want to have them submitted in this form.

Mr. Scholz: I think your Honor is right.

(Testimony of John Phillip White.)

The Court: You'll find them probably in the files in your office some place.

Mr. Scholz: Let it remain open until I find it and I will offer them in court.

Now, back to my original question. I was about to ask Mr. White a question based on the statement of Captain Petrie in his answer to the interrogatories propounded to Captain Petrie by the plaintiff himself, and if there is no objection I would like to ask him that question.

Q. In the interrogatories of Captain Petrie, which were propounded to him by yourself, Mr. White, he states in answer [47] to interrogatory 12 he advised the plaintiff personally—the plaintiff was advised that if he did find a dud he wasn't to touch it, but to mark it and someone from the disposal team would dispose of it. And now, did Captain Petrie make that statement to you?

A. Not in regard to the strafing range.

Q. Did he make the statement to you?

Mr. Bloom: If your Honor please, I am going to object for the record to the use of these interrogatories in this manner. In other words, he is now endeavoring to elicit testimony from this witness——

The Court: Rephrase the question. Mr. Witness, Mr. Scholz has asked the question whether or not Captain Petrie did make such a statement to him.

Q. (By Mr. Scholz): Did Captain Petrie ever make such a statement to you that if you found a dud you were not to touch it, but to mark it and

(Testimony of John Phillip White.)

someone from the disposal team would dispose of it?

A. He did not make such a statement in regard to the strafing range. He may have made such a statement at that time when I was considering investigating the artillery ranges; I do not recall. I was with that—I was concerned, I remember, for those areas which I decided. Those I wasn't concerned with, like anyone else, I made no effort to remember such.

Q. Did Captain Petrie state to you, did you state to Captain [48] Petrie, rather, that you were an ex-service man?

Mr. Bloom: If your Honor please, I think——

Mr. Scholz: This is cross-examination.

Mr. Bloom: Yes. I think it is improper use of interrogatories. Speaking about interrogatories, there is no evidence, if your Honor please, concerning what statements were made by Captain Petrie.

The Court: Overruled; he is entitled to ask the question on cross-examination.

Mr. Scholz: Will you read the question?

(The question was read by the Reporter.)

A. I probably did, but I don't recall it.

Q. And you did tell him that you were fully qualified to identify and properly mark duds?

A. I did not.

Q. But you did go out and mark a dud, you stated? A. I did mark a dud.

Q. And you also stated that that was the—they complimented you on the marking of your dud?

(Testimony of John Phillip White.)

Mr. Bloom: He said he did not.

Q. (By Mr. Scholz): You did not mark a dud?

A. I say I did mark a dud.

Mr. Bloom: I beg your pardon.

Q. (By Mr. Scholz): And you also stated that they complimented you upon the fact that you marked it so well, or words to that [49] effect?

A. I don't remember anyone complimenting me on the matter, if anyone did. The dud was already marked to a certain extent, but I was having people work out there and I marked it better.

Q. Well, when was that you marked the dud?

A. I would say it was either on the afternoon of November 18 or the morning of November 19.

Q. Now, you had worked in other, you had cleaned up other ranges, had you not?

A. Would you specify, Counsel?

Q. No. Well, you had cleaned up other ranges, have you not? You know what I mean by a range?

A. You mean ever in my life?

Q. Where people fire guns—guns——?

A. Yes, I have; I had at that time recovered bullet metals from target butts previously.

Q. And you told Captain Petrie that you had done so, did you not?

A. I don't recall; it is quite possible I did, but——

Mr. Scholz: That is all.

Mr. Bloom: No questions.

The Court: What, if any distinction, Mr. White, did you make in this matter between the artillery

(Testimony of John Phillip White.)

range and the strafing range with respect to the subject of hazards existing thereon?

A. To me artillery is large caliber guns which shoot explosives. [50] A strafing range—I have seen strafing and I have been the object of some strafing; I have seen strafing practice. That strafing is done with machine gun, machine guns and mounted in airplanes. To the best of my knowledge they don't even use any tracers when strafing, just a method of shooting at personnel with bullets, and so on, faster than with a rifle. Further, the strafing range wasn't, to my understanding, an artillery range, because the difference in size—what I mean, a 50 caliber, is my understanding about the heaviest caliber that they use for strafing and fires just a solid bullet.

The Court: What is the caliber of the missile in question in which you were unfortunately injured?

A. I believe it was a 37 millimeter.

Q. Is that the type ordinarily used in strafing?

A. No, sir; a 37 millimeter—refers to the diameter. A 50 caliber, I don't just know how much an inch it is, but a 50 caliber is about so long (indicating), with a bullet about as big as the joint of your small finger. And that is what is normally used in strafing. And so the strafing range does not appear to me to be an artillery range.

Q. What kind of material were you getting there in that range?

A. The brass. While the Army normally seems to police the brass in the firing line, when you're

(Testimony of John Phillip White.)

practicing, why, you have to pick up the empty cartridges. The airplane gunner can't pick up the cartridges and it was the empty brass cartridges which [51] had already been fired, which had already expelled its bullet, just the empty brass cartridge what I was looking for.

Q. Yes. Other than the missile in question which injured you on the day in question, did you find any other missiles of like caliber during the course of your investigation and collection of material?

A. I had not found any, although I had been sort of looking for them, because the Sergeant had told me that these antitank projectiles, I would likely find some of them on there, but——

Q. You were not looking for them, were you?

A. I didn't want to collect them and I wasn't actually looking for them. If I had found some I would not have been surprised in view of the fact the Sergeant had told me that some of them would be there.

Q. Well, this particular instrumentality that injured you was an antitank projectile?

A. I thought it was up to the moment it exploded.

Q. And that thinking on your part was the result of observation while you held it in your hand; is that so?

A. No, sir; while Lange held it in his hand.

Q. So you made your observation when Lange had it in his hand?

A. Yes, sir. He had picked it up and called my

(Testimony of John Phillip White.)

attention to it and held it in such a manner, and that was when I thought it was just one of those things that Sergeant Hodges had told [52] me I would find there.

Q. Can you assign to me any reason why Lange should toss that to you?

A. No, sir, I can't. I specifically told him that I was not looking for it, that I was interested in the brass. I can assign no reason whatsoever for his pitching it to me.

The Court: All right. I have no further questions.

Redirect Examination

By Mr. Scholz:

Q. You received a standard admonition from Captain Jones and Sergeant Hodges about staying away from duds——

Mr. Bloom: What is the question?

Q. (By Mr. Scholz): You received a standard admonition about staying away from duds, did you not?

Mr. Bloom: I will object to that as calling for a conclusion of the witness.

Mr. Scholz: That is his own statement.

Mr. Bloom: Standard admonition?

Mr. Scholz: Well, that is exactly the words he used. I quote it and it is on page 77 of the Reporter's notes.

The Court: Overruled.

Q. (By Mr. Scholz): You received an admoni-

(Testimony of John Phillip White.)

tion about the staying away from duds from Captain Jones and Sergeant Hodges, did you not?

A. I don't recall; I probably did. [53]

Mr. Scholz: That is all.

Mr. Bloom: May I have the question and answer read?

(The question was read by the Reporter.)

The Court: Is that all now for Mr. White?

Mr. Bloom: Yes, your Honor.

Mr. Scholz: That is all.

The Court: The case is submitted on the evidence?

Mr. Bloom: Yes, your Honor.

The Court: Save and *accept* the introduction or proffer in evidence of the interrogatories when and if they are found.

Mr. Bloom: Yes.

Mr. Scholz: I think all the exhibits are in. Oh, yes, one more.

The Court: Mr. McGee, will you collect all the exhibits, including those marked for identification, so that we will have a complete file?

Mr. Scholz: Your Honor, please, your Honor asked some questions of Captain Jones and I have here a circular from the Chief of Engineers.

(Discussion between the Clerk and Court.)

Mr. Scholz: If your Honor please, I have here a circular from the offices of the Chief of Engineers, dated 6 November, 1946, which I believe answers some of your Honor's questions in regard

to disposal, and I offer that in evidence, if Your Honor please, as Defendant's exhibit next in [54] order.

The Clerk: Defendant's Exhibit "F."

Mr. Scholz: That is an amendment to the circular, is it?

Mr. Bloom: I believe it is; that was the subject of request for documents, but I have no objection to the thing.

The Court: All right, it may be marked.

(Whereupon the document above referred to, marked the Defendant's Exhibit "F," was received in evidence.)

Mr. Bloom: Now, if your Honor please, I was wondering if your Honor would like to hear some argument?

The Court: Yes.

Mr. Bloom: If so, I am ready to proceed.

The Court: I would like to hear some discussion on the matter and probably after the discussion you might have a very short brief on the matter from both sides.

Mr. Bloom: Very well.

The Court: I would like to have some law on it, too.

Mr. Scholz: If your Honor please, may we continue this matter, too, until we see about those interrogatories and then complete the case and then have the case submitted, and then if you Honor wishes oral argument——

The Court: I would like some discussion on the

subject, Counsel. And it is now 4:00 o'clock, approximately. I am willing to hear it some afternoon immediately; I don't want too much time to elapse. I am trying a case in the morning; say immediately after that criminal case is over. Mr. McGee [55] will advise counsel.

Mr. Bloom: Very well, your Honor.

The Court: Have an afternoon set aside, an hour or so, and then you look in the exhibits; find if you have the interrogatories, and if you haven't them, of course, that is another matter, they are lost. Do the best you can. I realize the burden is on you, Mr. Scholz.

Mr. Scholz: It wasn't my case originally.

Mr. Bloom: Possibly tomorrow afternoon?

The Court: I am starting a criminal case in the morning, Mr. McGee.

The Clerk: Yes, your Honor.

The Court: Probably be a couple of days on that.

Mr. Bloom: Your Honor doesn't wish to hear any discussion at this time?

The Court: It is 4:00 o'clock; might as well discontinue. Might collect some law on the subject, whatever law there is.

Mr. Scholz: I have a couple of cases. I don't know how close it is, but there is a couple of cases.

The Court: No doubt there will be some briefing.

Mr. Bloom: Yes, I have quite a bit of authority, if your Honor please.

The Court: All right.

Mr. Bloom: Some of them I would like to call to his Honor's attention in our argument. [56]

The Court: Give me the cases now; I will—probably better reserve the cases until I hear about it.

Then this matter will be regularly continued on the case of White, on John Phillip White versus the United States of America, will stand regularly continued until a date—have to give it a day certain—let us put it down for Friday afternoon, Friday afternoon at 2:00 o'clock.

The Clerk: November 10, at 2:00 p.m.

The Court: Subject to be reset or otherwise continued in the event I have not completed the criminal case which is about to go forward; at that time hear the oral argument and any law you have on the subject. [57]

Wednesday, July 11, 1951

The Clerk: White vs. United States, on trial.

Mr. Bloom: Ready for the plaintiff.

Mr. Scholz: Ready for the defendant.

Mr. Bloom: Your Honor, you will recall that this matter is reopened for the limited question of damages and for the purpose of throwing further light on the present condition of the plaintiff with respect to damages.

Now there was filed in this matter, if your Honor please, a claim of lien on behalf of the Industrial Indemnity Company in the sum of $4,438.54. At this time, with your Honor's permission, we would like to file a supplemental claim of lien for expendi-

tures, medical expenditures made by the carrier since the last hearing in November. In that connection I have shown Mr. Scholz receipted bills.

Mr. Scholz: Well, I didn't examine them. You showed them to me, but I didn't examine them.

Mr. Bloom: Yes. Would you care to examine these? These are from St. Mary's Hospital and Dr. Edmund Morrissey.

Mr. Scholz: Have they been paid?

Mr. Bloom: They have been paid.

Mr. Scholz: By the Industrial Indemnity Insurance Company?

Mr. Bloom: That's correct. [2*]

Mr. Scholz: They appear to be right in order.

Mr. Bloom: I am going to ask if you will stipulate that these expenses were incurred on behalf of the plaintiff, and that they are reasonable in amount and have been paid in the same manner as you stipulated before on the medical, in the same manner as you stipulated before on the medical.

Mr. Scholz: They appear to be in reasonable amount and I personally have no question but that they are correct bills and that they have been presented. I will certainly take Mr. Bloom's word that they have been paid, although some of them are not marked paid. May I ask you, Mr. Bloom, do you know personally if these are the bills rendered by the concerns indicated?

Mr. Bloom: Yes, I do; and they are the subject

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

matter of this supplemental claim of lien which is verified by an officer of the company.

Mr. Scholz: Yes. In that case, I have no objection, your Honor.

Mr. Bloom: You will so stipulate, then?

Mr. Scholz: I have no objection to it being offered in evidence and I will stipulate that they are reasonable value.

Mr. Bloom: Thank you. With your Honor's permission, I ask leave to file this supplemental claim of lien.

Mr. Scholz: No objection, with the supplemental claim of lien, your Honor. Mr. Bloom has hitherto filed a claim of [3] lien, but it was my opinion that the insurance company should come into Court. I am not too positive on that, and I thought they should file suit on it. I just merely advised the Court of my idea on it. I also advised the Court at the time they filed the original claim of lien, and I think the Court overruled me, rather properly. Outside of that, I have no objection.

The Court: The supplemental claim of lien may be filed herein.

Mr. Bloom: Now, if your Honor please, I have shown counsel a proposed second amended complaint, which we now offer for filing. This complaint is merely designed to conform to proof which was adduced at the trial and to clarify the damages for the amount, the amount of damages and the exact nature of damages sought, and also to provide for the expenditures which have been made since the time of trial. Otherwise, it conforms to

the nature and allegations of the original complaint in the first amended complaint. I now offer for filing this second amended complaint.

Mr. Scholz: If your Honor please, I have just received this second amended complaint and I don't see that it serves any purpose. It apparently is the same as heretofore filed, except it increases the damage from $60,000 odd, isn't it?

Mr. Bloom: Yes.

Mr. Scholz: To $63,881.19, and I don't see any reason [4] for filing the same.

Mr. Bloom: Well, in respect to the augmented damages, if your Honor please, that will be the subject of discussion, I presume, at the conclusion of the evidence here. But basically the complaint——

The Court: I notice in paragraph 6 that you have——

Mr. Bloom: Yes, your Honor, that is one of the changes. That is amended to conform to the proof and is in accord with the medical testimony of Dr. Morrissey and of the plaintiff, and I think is a more accurate description of the injuries sustained than is contained in the original complaint. That really is the only purpose of it. And all of the specifications in that paragraph, if your Honor please, find support in the transcript of the trial.

The Court: Paragraph 10 sets forth the items of $946.93 for the physicians and surgeons, $2,319.26 for hospitalization, including drugs and medication and X-rays.

Mr. Bloom: Yes. Now in that connection, if

your Honor please, those sums are now the subject of the two stipulations which have been entered and have been broken down and made accurate in amount.

The Court: $115 for the man's services?

Mr. Bloom: Yes, and that is also the subject of a stipulation, being one of the expenditures of the Industrial Indemnity. [5]

The Court: Now the loss of compensation provided for in paragraph 8——

Mr. Bloom: That, your Honor, is in amount and in nature the—exactly the same as in the original complaint. The only difference is that we have added two sentences there to show, as the evidence showed, that there was augmented earnings for a period. For example, on page 3, on line 20, we have added this sentence to conform to proof, "That thereafter the plaintiff's earnings from said employment were approximately $400 per month," rather than the $250 which were his earnings at the time of the accident. And then we have added on line 25 the sentence, "Subsequently his earnings from said employment were approximately $600 to $700 per month." Also, to conform to proof. But as to the amount sought, that has been left precisely in the original condition.

The Court: Well, may the answer on file as embodied in that answer on behalf of the United States of America be deemed the answer to the second amended complaint?

Mr. Bloom: Certainly, your Honor.

The Court: Counsel for the Government, the

answer on file may be deemed to be the answer to this second amended complaint.

Mr. Scholz: I was going to say, your Honor, that of course we have had no time to plead to it. We just received it. But I don't think the answer on file would cover those [6] other allegations. If your Honor is going to admit that, I would think that the best thing to do would be to stipulate that all the matter contained therein is denied.

Mr. Bloom: That is satisfactory.

The Court: Save and except such items as may have been stipulated to.

Mr. Scholz: That's right, or admitted in the original answer.

The Court: Well, I think you had better file a written stipulation on that.

Mr. Bloom: Very well.

The Court: Now do you intend to offer proof at this juncture with respect to damages?

Mr. Bloom: Yes, your Honor. I will have two witnesses, short witnesses; Dr. Morrissey will be here, and the plaintiff. With your Honor's permission I would like to put Dr. Morrissey on the stand.

The Court: Call the Doctor.

EDMUND J. MORRISSEY

called on behalf of the plaintiff; sworn.

The Clerk: Please state your name, your address and your professional calling to the Court.

A. Edmund J. Morrissey, 450 Sutter Street, physician and surgeon. [7]

(Testimony of Edmund J. Morrissey.)

Direct Examination

By Mr. Bloom:

Q. Dr. Morrissey, the plaintiff in this matter, John Philip White, has continued to be under your care and supervision since the time of your testimony in November in this case; is that true?

A. He has reported occasionally at the office for check-up examinations, and on one or two occasions has been confined to the hospital.

Q. Would you please tell the Court what the nature and extent of your treatment of Mr. White has been since the trial?

A. Well, the only treatment as far as hospitalization is concerned is this ulcerated area on the lateral surface of his left foot. That has a tendency to become infected, and when it does, we hospitalize him and keep the foot in absolute rest and hot compresses, and give him antibiotics, usually penicillin.

Q. He has been so hospitalized, has he not, on two occasions since your testimony in November of last year?

A. Yes, he was hospitalized for a few days in November and in April of this year.

Q. And what hospitals? Do you recall what hospitals he was confined in?

A. I know the last time he was confined to St. Mary's Hospital. [8]

Q. And Mr. White reported to you for observation as recently as what date?

A. A few days ago.

(Testimony of Edmund J. Morrissey.)

Q. Now in examining and treating Mr. White as you have just described, did you find that his condition was more or less the same as you testified to in November of last year?

A. His findings suggested the same, except for these occasional exacerbations that he has.

Q. I see. Now in that connection you will recall that you testified in November of last year that in your judgment the recurrence of the breakdown of this trophic ulceration and the condition of this lower extremity, his left extremity, was a permanent injury and that it was likely to recurrently break down. Now your observation of the patient since November of last year; has it verified your diagnosis in that regard? A. Yes.

Q. And you adhere, do you, to your testimony; that is, to your prediction as to the prognosis and future disability of the patient?

A. The only thing I can state is that these trophic ulcerated areas have a tendency to break down and require treatment from time to time.

Q. Now, Doctor, in that connection, this ulcerated area of White's, the ulcers are rather deep; is that not so? [9] A. Well, it is fairly deep.

Q. In cases of this kind and from your past experience, would you say that there is a possibility of infection or bone involvement in a case of this nature?

A. Well, there is a possibility in any trophic ulceration of this type that the infection may spread into the deep tissues of the foot and into the bone.

(Testimony of Edmund J. Morrissey.)

Q. I see. In the event that it would so spread, amputation of some kind would be called for, would it not? A. Well, there is that possibility.

Q. Now in connection with White's condition and what you have seen of him, could you tell us in your opinion what expense this man is likely to incur by way of hospitalization and medical treatment in the years to come? How much per year, would you say?

Mr. Scholz: I think that that is objectionable, your Honor; I think it is too remote and no proper basis for it. Objection is made on that ground.

Mr. Bloom: I will ask the Doctor the question in a different form.

Q. (By Mr. Bloom): How many days per year would you say the patient is likely to be immobilized or to require hospitalization in the future?

A. How many——?

Q. How many days per year? [10]

A. That is awfully hard to say. I would say that you could probably plan on two weeks a year.

Q. What would you say would be the likely costs of medical and hospitalization per year in the future?

A. Oh, it would run between probably $500 and a thousand.

Q. $500 to a $1,000? A. Yes.

Mr. Bloom: I think that's all. Thank you.

(Testimony of Edmund J. Morrissey.)

Cross-Examination

By Mr. Scholz:

Q. Doctor, has Mr. White been completely healed from any disability incurred in this accident outside of the trophic ulceration?

A. I think that his chief disability is that, yes. He has some sensory changes over the lateral surface of the foot, but I don't think that is too important, except in its relation to the trophic ulceration.

Q. And because of that trophic ulceration, you anticipate that, as best you know, he will possibly be disabled for about approximately two weeks a year?

A. Yes. It depends entirely on how much he is on his feet and so forth, but in the past it has been averaging that, I think.

Mr. Scholz: That's all, Doctor.

Redirect Examination

By Mr. Bloom:

Q. One question only, Doctor. You also [11] recall you testified, or rather you observed or found that the patient had a shortened toe or great toe of the right foot. You recall that condition and you recall that your testimony was that that situation or condition resulted in a permanent disability. That is true, is it not?

A. I think its shortness is permanent, yes.

(Testimony of Edmund J. Morrissey.)

Recross-Examination

By Mr. Scholz:

Q. That has—has that any disabling result; does that have a disability rating? I mean, would that interfere in any way?

A. If this was before the Industrial Accident Commission, he would probably get something for it.

Mr. Scholz: That's all.

Mr. Bloom: Thank you, Doctor.

(Witness excused.)

Mr. Bloom: Mr. White, please.

JOHN PHILIP WHITE

called in his own behalf; sworn.

The Clerk: Please state your name, your address and your occupation to the Court.

A. John Philip White, four Third Street, Sausalito. Metal business.

Direct Examination

By Mr. Bloom:

Q. Mr. White, since the time of the trial when you testified in this matter in November of 1950, last [12] year, have you required further hospitalization or medical treatment on account of the injuries you sustained? A. I have.

Q. Now when did you first require such attention since the trial?

A. On November 11th, I believe. It was November 11th.

(Testimony of John Philip White.)

Q. Where were you sent?

A. St. Mary's Hospital.

Q. Was that under Dr. Morrissey's supervision?

A. Yes.

Q. How long were you in the hospital?

A. Three days.

Q. What was the reason for your being confined to the hospital?

A. The ulcer on my foot flared up and I was unable to walk.

Q. When you came out of the hospital, were you using crutches again or other mechanical aid?

A. Well, I got out of the hospital only on the promise that I would stay in bed for three days at home. They didn't feel that penicillin was necessary any more, but they didn't want me to stay—they wanted me to stay off the foot. And then after spending three days at home in bed, I was on crutches for about ten days, I believe.

Q. All right. Now thereafter what was the second occasion on which you required further treatment? [13]

A. In the last week in April, I was sent to St. Mary's Hospital.

Q. How long were you there this time?

A. One week.

Q. What treatment, if any, was given you then?

A. I was given penicillin every three hours and my left foot was put in hot compresses every two hours for five days.

Q. When you left the hospital, were you using

(Testimony of John Philip White.)

or compelled or required to use crutches or a cane?

A. I left on a Thursday and I used crutches then for ten days until I reported to the doctor again on the Monday following, the next week.

Q. All right. Now were there any other occasions since the trial when you required further hospitalization or medical treatment?

A. I have not required any additional hospitalization. However, I have had momentary flare-ups of my foot, in which case I have stayed at home and stayed off of it.

Q. Now you recall, do you, your testimony as to your physical condition as of the time of trial; namely, November of 1950? Do you recall the testimony that you gave at that time?

A. I think so.

Q. Would you say that your condition is any different? Is it better or is it worse or is it approximately the same as of the time of trial? [14]

A. I think it is approximately the same.

Q. Would you say that the symptoms which you described in detail, the manner in which these injuries affected you and manifested themselves, were more or less the same now as they were then?

A. There has been no change.

Q. Would you briefly describe, then, what those symptoms are as of today?

A. Well, I have the permanent sensation of having my foot slightly twisted out of shape, and as though it were in a small shoe, and there's a lack of sensitivity on the bottom of the foot. There's

(Testimony of John Philip White.)

a couple of areas of hypersensitivity. Periodically the foot grows warmer and the whole feeling intensifies, in which case I go to the doctor and the doctor either tells me to go home and go to bed or he tells me, "Go to the hospital." That's all.

Q. Would you say that this disability in your lower extremities affects or influences your activities and your work in the manner that you described in November of 1950?

A. Yes, it still has the same effect. I am limited as to the amount of time I can stand or how far I can walk. It affects how I spend my free time. That is the same; it has the same effect as it had last November.

Q. Now you recall you testified in November that your recreational activity, such as bowling, climbing and walking, [15] which you had been accustomed to do, had to be eliminated. Is that true now? A. That is still true.

Q. And you testified that these disabilities affected your business or occupation in that it didn't permit you to get around and contact clients or customers in the way you did. Is that true now?

Mr. Scholz: If your Honor please, I believe that Mr. Bloom is leading the witness. I think he should ask him.

Mr. Bloom: Well, it is leading, I know.

Mr. Scholz: I object to it on that ground.

The Court: Overruled.

Q. (By Mr. Bloom): Is that substantially the same; is that true now?

(Testimony of John Philip White.)

A. That is substantially the same.

Q. You have more or less the same interference with your occupation?

The Court: Has there been any impairment of earning capacity?

Mr. Bloom: Well, the testimony heretofore, your Honor, has been that, first of all, the loss of wages occurred on three occasions and also there is testimony in the record of permanent loss of earning capacity to a certain extent, in that the plaintiff is unable to, in the metal business where he had to contact many customers, get out in the field. [16] He no longer could do that, and the testimony showed that his earnings and his commissions at the later date dropped on account of it. So I assume that the record——

The Court: There is testimony to that extent?

Mr. Bloom: Yes, your Honor.

The Court: What is his present occupation?

Q. (By Mr. Bloom): Well, what is your present occupation?

A. I purchase waste materials from industrial plants. These waste materials are processed by a firm with whom I have an arrangement to process the materials, where I confine myself to the buying of them.

Q. Then you have changed your mode of activity to a certain extent since November of 1950; is that right?

Mr. Scholz: I object to that on the ground it is leading and suggestive.

(Testimony of John Philip White.)

The Court: Overruled.

A. No, I have not essentially changed my occupation since November, 1950.

Q. (By Mr. Bloom): I didn't say your occupation; I said your mode of activity. You were a salesman before, were you not?

A. Not in November of 1950.

Q. Well——

A. Since I have been in business for myself, there was a time when I operated a plant. I no longer operate a plant. My activities and my business are confined strictly to the [17] buying. Now in the inability to operate a plant, that is perhaps a change in occupation, although it is more a severing of a function of the business.

Q. Well, would you have the same difficulty in contacting customers and getting around in the field as you previously described?

A. I would have difficulty seeing a large number of people. I confine myself now to seeing a relatively few larger accounts.

Q. I see.

Mr. Scholz: I object to that on the ground it calls for his conclusion.

The Court: Overruled.

Q. (By Mr. Bloom): By the way, Mr. White, what is your birth date?

A. January 22nd, 1911.

Q. One question I don't think was perhaps completely covered before. Prior to the date of this accident, November of 1946, what was your general condition of health?

(Testimony of John Philip White.)

A. I was quite healthy.

Q. And what was the condition specifically of your lower extremities? A. Excellent.

Q. Both feet and legs normal in every respect?

A. Yes. [18]

Q. Particularly in reference to the left foot, that was completely normal? A. Yes.

Q. You engaged in hiking, bowling and other forms of exercise? A. I did.

Mr. Bloom: That's all.

Cross-Examination

By Mr. Scholz:

Q. Mr. White, what is your average earnings now?

A. That is rather difficult to say, Mr. Scholz. In the change, the reorganization of my business, and in the condition of the metal markets right now, it has been impossible to draw up any balance sheet for this year's activities which would show any true picture. In general, my business is good.

Mr. Scholz: That's all.

The Court: Counsel for the plaintiff, have you heretofore offered testimony in support of the allegations of paragraph 8 with respect to the loss of earnings, with more particular reference to the matter contained therein?

Mr. Bloom: Yes. If your Honor please, that is——

The Court: There is one item of a thousand dollars.

(Testimony of John Philip White.)

Mr. Bloom: Yes.

The Court: Another item of $1,400, and another item of $2,300. [19]

Mr. Bloom: Yes, that has been testified to, if your Honor please, and no contradictory testimony offered.

The Court: Now subsequent to the hearing, has there been any other loss of earnings, according to the records kept by this man?

Mr. Bloom: Well, we have made no tender of proof of any specific loss of earnings, because of his changed business. It is impossible for us even to calculate it.

The Court: And one further question. To what extent were payments made to the plaintiff herein under the Workmen's Compensation?

Mr. Bloom: Well, for your Honor's information—and that is the subject of the original claim of lien——

The Court: And that was how much?

Mr. Bloom: Filed by the Industrial Indemnity Company, that shows temporary disability payments of $1,271.50.

The Court: $1,271.50. And what are the other items included? Medical expense?

Mr. Bloom: The other is the medical, if your Honor please.

The Court: What was the total medical?

Mr. Bloom: Well, the record——

The Court: The original claim or lien was in excess of $4,000?

(Testimony of John Philip White.)

Mr. Bloom: That's correct, your Honor. [20]

The Court: I just want the items for my own record.

Mr. Bloom: Yes. And I will give you my——

The Court: He was given a temporary rating, was he?

Mr. Bloom: No permanent rating. Just temporary disability.

The Court: Well, according to Dr. Morrissey, this man has a permanent disability.

Mr. Bloom: Oh, yes, but in view of the fact that this action was pending, there was no necessity to carry it through to a permanent disability rating. If your Honor please, the state of the record now shows this. On the question of special damages, it shows a loss of wages, and for your Honor's convenience I had this typed up.

The Court: Thank you. I would appreciate that very much.

Mr. Bloom: The special damages are listed under paragraph 1, totalling $8081.19. That includes the loss of wages at $4,700, the ambulance at $115, and the stipulated medical, physicians, $946.93, and hospitalization at $2,319.26. That is the proof that is now in evidence.

Now in respect to the other items designated there at the appropriate time, or if your Honor desires, we would like to say a few words on that with respect to general damages.

At this time, if your Honor please, I would like to either read into evidence or offer in evidence

(Testimony of John Philip White.)

for your Honor's [21] convenience the official publication of the Federal Security Agency, United States Public Health Service, National Office of Vital Statistics, in respect to the life expectancy of white males in the United States, and I particularly refer to page 34, Table 5.

The Court: Is that the standard mortality table?

Mr. Bloom: Yes, if your Honor please, this is the official United States publication. The two ages that we are concerned with here would be the life expectancy, the age—that is, as of the time of the accident, which would be 35 to 36, showing an average future life expectancy of 34.36 years. We are also concerned with the life expectancy as of the present time—that is, the future life expectancy, the probable special damages and the medical likely to be incurred. The age there would be 40 to 41, and the life expectancy, if your Honor please, would be 30.03 years now. If your Honor wishes, I could leave this here. Otherwise, perhaps reading it in evidence in this manner would be sufficient.

The Court: There is no specific objection, I think the reading in evidence of the tables will be sufficient for my purpose. Unless counsel for the Government has a specific objection?

Mr. Scholz: Yes, your Honor, I didn't see this before. I would like to look this over and probably I won't have any objection, so let's read that in and then I can look this over [22] and tell your Honor

(Testimony of John Philip White.)

and then there—if there is no objection, it may be read into evidence and may be admitted.

The Court: All right, sir. [22-A]

The Court: Does the plaintiff have occasion to use a cane in the ordinary course of his travels?

Mr. Bloom: The evidence showed, if your Honor please, that the plaintiff used either crutches or a cane intermittently for the past four and a half years, from the time of the accident up to November, and I presume that that condition exists whenever there is a flare up.

Q. Is that correct, Mr. White?

A. That is true.

The Court: That relieves the pressure on the ball of your foot, does it?

A. Yes, sir.

Q. Do you have a constant pain, Mr. White, or is it a recurring pain?

A. I have a constant pain. It is enough for me to be conscious of it.

Q. Could you describe it for me.

A. Well, whether I have a shoe on or not, Judge Harris, I feel that I have a shoe on. The shoe is ill-made. It is a pigeon-toed shoe.

Q. You had that specially made?

A. No, that is the shoe that I feel that I have on.

Q. I see. Are you required to buy special shoes or have special shoes constructed for your foot?

A. I have had some special shoes constructed. However, I found [23] the greatest satisfaction in

(Testimony of John Philip White.)

the Health Spot shoes which Dr. Morrissey recommends.

Q. He recommended a special shoe?

A. Yes. It is Health Spot Shoe. But I feel as though I have on a shoe that is about a half size too small and has a toe pointed inward.

Q. Do you have a constant drainage from this ulcerated condition?

A. Not constant. I would say that approximately 50 per cent of the time there is some drainage of either blood or pus. Dr. Morrissey recommends that execept on those——

Q. Do you use an inner sock of any kind?

A. I wear a bandage.

Q. How big is this ulcerated condition or this sore itself?

A. It varies from something—I will start immediately after getting out of the hospital. It doesn't exist. I don't think I have ever been out of the hospital more than two weeks before this started again. Two weeks of even limited activity on my feet will start the ulcer again, and it starts off about the size of the head of a pin, and when it is at its worst, it may be as big as a nickel.

In addition to the ulcer itself, there is always accompanying it great callus. It is rather difficult to tell where the callus ends and the ulcerated portion begins, but I have a practically constant callus on that side of the ball of [24] my foot.

Q. You use a car in the course of your business enterprise, do you?

(Testimony of John Philip White.)

A. Yes, sir. I not only use a car but I used to have another car, and Dr. Morrissey told me I couldn't drive a car any more unless I got a car without a clutch.

Q. You use a hydromatic?

A. I have a hydromatic, without a clutch, and Dr. Morrisey has specifically forbidden me to drive a car with a clutch.

Mr. Scholz: I think that is hearsay, your Honor.

The Court: Overruled.

The Court: How often do you see Dr. Morrissey in the course of a year?

A. That varies, your Honor. However, whenever the level of pain rises above what I have grown to consider normal, I go to see Dr. Morrissey, and sometimes the condition has been such that he will say, "I want to see you Monday." I go there either on Monday, Wednesday or Friday, and he will want to see me on his next working day, and I have seen him on successive working days for as much as three times in a row. Sometimes he will say, "Come back next week." I have seen him every week or fairly long periods. I have been seeing him once a week. However, I was in the hospital in April, I got out in May, and I went to see him ten days after I got out of the hospital, at which time he said, "Well, it looks pretty good. Come back to see me again if [25] you feel any worse."

Q. Has he been in attendance as you have indicated since the accident, Dr. Morrissey? Was he your original physician?

(Testimony of John Philip White.)

A. No, sir, the original physicians were doctors Moore and Halter and Wilkie. However, it was about seven months after the accident that Dr. Moore and his associates made some mistakes, and Dr. Morrissey has been in charge ever since.

Q. He is a very capable man, Dr. Morrissey?

A. I think so.

Q. What is this business that you have now? Is that your own business?

A. Yes, sir, it is my own business, and in view of the fact that I was no longer able to be as active as I have been in the past I couldn't see the number of customers. When I was working as a salesman, I used to have to see 20 or 30 people a day, which is a matter of parking the car and walking—it may be only a block between the——

Q. That is when you worked for the Mars Metal Company?

A. Yes, sir. Now I am specializing and confining myself to the purchase of waste materials, for which I see some profitable use from large industries, where they can be bought in large quantities, and, as I say, Mars Metal Company have an agreement with them to process the materials that I purchase. However, the materials are purchased by me. I am not a salesman for Mars Metals. The materials are purchased by me, and most [26] of them are at the moment processed by Mars Metal Company. That is not true of all of them. I have some other arrangements on some other materials.

Q. Does your wife assist you?

(Testimony of John Philip White.)

A. Yes, my wife assists me. My wife does a certain amount of bookkeeping or record keeping for me. However, I have the use of a stenographer. I have an office.

Q. Where do you maintain your office?

A. 1675 Calvin Street.

Q. Do you have any employees there?

A. No. My rent includes the use of a stenographer. My statement that it was difficult to say what I was making at the moment was not an evasion. The business is such that at the moment I am drawing $600.00 a month out of the business.

Q. You say business is pretty good now?

A. The business looks promising.

Q. There is a good market for scrap material at the present time?

A. Yes, sir, but I am not handling actually scrap. I am handling waste materials, much of which is speculative materials, which have been previously discarded completely. We think things are going to be pretty good, but it is still speculative, and I only draw a limited sum out of the business.

The Court: I have no further questions. Mr. Scholz, do you have any questions. [27]

Mr. Scholz: No further questions of this witness.

Q. (By Mr. Bloom): Mr. White, did you say you were drawing out $600.00 a month, or a week?

A. A month.

Q. You meant a month, all right.

Mr. Bloom: If your Honor please, that is the

only testimony that we expect to offer. We had Mr. White, in accordance with your Honor's suggestion, examined by an Army or Government doctor. We have not received any copy of the medical report from the doctor, but I presume that Mr. Scholz has such a report. He has told me that he has that report.

Mr. Scholz: Yes, the report came in while I was down at Ft. Ord. I can say this briefly, your Honor, that it finds practically the same as Dr. Morrissey.

The Court: You are satisfied with the medical?

Mr. Scholz: I am satisfied with Dr. Morrissey.

Mr. Bloom: If your Honor please, I am wondering if it would not be advisable to have that medical report before the Court.

The Court: I am satisfied with Dr. Morrissey's testimony. I have a very high regard for Dr. Morrissey. I have had him in court many times, and invariably I have found he is not only accurate in his findings, but very forthright in his presentation of the evidence.

Mr. Scholz: I think he is fair to the Government and fair [28] to the plaintiff.

Mr. Bloom: I made this suggestion because I had reason to believe that this is one of those unusual situations where the doctors on the other side might even go further than the plaintiff's own doctors.

The Court: I can't certainly compel Mr. Scholz to disclose it if he is not willing to present it to the Court. He is resting within his rights, of course.

Mr. Bloom: Very well, your Honor. I take it, then, your Honor's suggestion or ruling was not an order to have—well, just cover the examination, that is true, not the production of a report.

The Court: Now, the second item that you have here, Mr. Bloom, is one of pain and suffering, disfigurement, interference with activity at the rate of $750 per year for his life expectancy. What is the basis for that accounting?

Mr. Bloom: That paragraph 2, if your Honor please, of course, is the one speculative part of our request for damages. How to assess it, of course, is a difficult thing to determine. What we are purporting to do there is to reduce mathematically, to mathematics, somehow or other, the compensation which the law, of course, entitles this man to, namely, prospective pain and suffering, and disfigurement, interference with his normal activities such as running, climbing, bowling, and so forth, from the time of the accident, namely, November 22, 1946. The [29] testimony, I think, is pretty clear that this man is going to sustain trouble for the rest of his life, a certain amount of pain, a certain amount of suffering, this disfigurement will be there, the shortening of the right foot, the right toe is there, that is permanent. The ulceration is recurrent. That is permanent. And therefore he is entitled, I think, to some compensation for his life expectancy, in view of the permanency of this disability. We have selected arbitrarily a figure of $750.00 per annum as compensation for that type of

thing, and while I realize that the multiplication of that figure by the 34.36 years gives a rather substantial sum, namely, $25,770.00, nevertheless I think the sum of $750.00 per year for this type of suffering, pain, interference with activities is not an exaggerated amount for the injuries sustained. I doubt if any of us—well, I know none of us would be willing to accept a figure of that amount for the penalty of suffering this kind of disability and interference with his activities and life.

As far as the third paragraph here is concerned, if your Honor please, we are not dealing in speculation. I do not think there any speculation would be of a most limited character. We are asking there for prospective and probable loss of wages of $250.00 per year, plus medical and hospitalization costs of $750.00 per year, or a total cost of $1000.00 per year for the life expectancy. Now, this morning, Dr. Morrissey has testified that the medical, the hospitalization for this man's life will probably [30] cost him around from $500.00 to $1,000.00 a year. That is his prediction, and I think he is a man eminently qualified to make such a prediction. We have taken a sum of $250.00, which is an arbitrary sum, to be sure, to cover the loss only while White will be hospitalized or undergoing total immobilization during the prospective years, and we took the low figure of $250.00 because that is the only figure on which we have any evidence; that is his commencing salary at the time of the accident, the very low figure, the lowest figure in evidence, although his pain and suffering later went up to $600 or

$700 per month. We take the initial figure of $250.00, and that, with Dr. Morrissey's testimony that the prospective hospitalization and medical will be $500 to $1000 is for the rest of this man's life, which from today on, namely, July 11, 1951, will be 34.36 years, and we have a total of $30,030 for prospective loss, mostly medical hospitalization, out of pocket expenses, which an authority of Dr. Morrissey's eminence places at $500 to $1,000 per year. The total figure, if your Honor please, of $63,881.19, is the amount prayed for now in the second amended complaint, and that is the method whereby that sum has been calculated.

The Court: Do you have any observations to make, Mr. Scholz?

Mr. Scholz: Just very briefly, your Honor this: I do not recall exactly the loss of wages, but it seems to me that is rather high. I am talking about the special damages. The [31] ambulance and the rest of it is all right. The pain and suffering—that is something the Court will have to decide.

The Court: Mr. Scholz, so there will be no misunderstanding as to the loss of wages that has been paid, $4,700 has been paid.

Mr. Bloom: That is the actual loss sustained.

The Court: That is the loss sustained.

Mr. Scholz: Paid by the Industrial Accident Commission.

Mr. Bloom: No, that is out of pocket loss that the man sustained.

The Court: Do you have any objection to that?

I should like to hear a specific objection to it. There is testimony in support of it.

Mr. Bloom: The testimony is uncontradicted, and we supplied, at Mr. Scholz' request, some documents from the company for interpretation.

Mr. Scholz: That is correct, and that is why my impression was that was not correct. It is only an impression. I can't say yes or no because I do not have in mind what the testimony was, but that is my impression that it did not amount to that much. The rest of the items I think are all right. Pain and suffering is entirely up to the Court. I believe the prospective *wages is* too high for this reason. It appears Mr. White is making as much, even more now than he did before. It is true that he testified that his business was such that he could not tell how much he is making, but I am inclined to view that with [32] a little apprehension because it seems to me that any person in business should have records and be able to tell. I do not think that the testimony would support a $30,000 loss of wages.

The Court: Of course, Dr. Morrissey points out, somewhat guardedly, of course, because the prognosis reaches into the future, that more serious consequences may flow in the wake of this ulcerated condition and, of course, I am mindful that the doctor is very conservative in his usual testimony. But that must also be considered, isn't that correct, Mr. Bloom?

Mr. Bloom: That is my understanding, if your Honor please.

Mr. Scholz: My understanding was if there is testimony that he had an ulcerated, trophic ulceration of the foot, and I do not think there is any question of doubt in my opinion—in fact, it was confirmed by the Letterman General Hospital.

The Court: He indicated it might get into the bony structure.

Mr. Scholz: He said it might, but as I recall his testimony now—I am speaking partly from memory and my memory sometimes is not too good—that it is a possibility. The outside of the toe, he had no difficulty from that.

The Court: He said it might get into the deeper tissues.

Mr. Scholz: It might. Anything is possible, your Honor.

Mr. Bloom: Since I asked the question I think I remember these answers. The testimony is the ulcer is fairly deep, that there might be infection. There is hostility, to use his [33] language, of infection of the bony structure, and in such event amputation might be necessary.

Mr. Scholz: Any doctor will testify that anything is possible. There is no such thing as physical impossibility so far as health is concerned. I may be dead here in a half hour.

The Court: What does your doctor say about that as to the future prognosis?

Mr. Scholz: "It is expected that the trophic ulceration which he had in the past will recur. I believe this disability is permanent enough to prevent this man from engaging in any activity in the fu-

ture which will require standing or walking for more than the minimum period at a time."

Mr. Bloom: Is there anything said about amputation?

Mr. Scholz: No, there is not a thing said in there. I might as well read it. I have no objection.

"Physical examination at this time reveals a well nourished, well developed individual. Examination was confined to the lower extremity. On ambulation the patient walked with a limp because of inability to correctly bear weight on the left foot. This was more noticeable without shoes than with shoes. Examination of the right leg and foot revealed a well healed scar that was non-tender and non-adherent over the upper enterior lateral aspect of the right leg. There was a normal range of right knee motion, right ankle motion, subtalar and mid-tarsal motions. Motions of all the [34] toes were normal actively and passively except for the great toe, in which case there was almost complete loss of plantar flexion. The right great toe is ½" shorter than the left, the shortening being in the 1st metatarsal. There is crepitus in the interphalangeal joint of the right great toe on motion. This is subjectively painful. There is some pronation of the longitudinal arch and depression of the metatarsal arch of the right foot. There is a 2½" scar running diagonally across the dorsum of the right foot over the 1st metatarsal. There is numbness over the entire right great toe except for the proximal portion of the lateral aspect. X-rays of the right foot reveal a well healed fracture in good position and

alignment of the 1st metatarsal right foot with approximately ½″ shortening. There is a punched-out area in the head of the proximal phalanx of the 4th toe. Examination of the left knee showed a normal range of motion. There is some loss of dorsi-flexion of the left ankle. The dorsi-flexion was limited to 90 degrees. The plantar flexion was normal. The foot had a rather cyanotic appearance and felt colder than the right foot. Passive motion of the interphalangeal and the metatarsal phalangeal joints was normal. However, there was some loss of active motion in these joints. The range of motion in the subtalar and mid-tarsal joints was normal. However, dorsi-flexion of the foot caused pain on the dorsum of the foot in the region of the tarsal metatarsal joints. There was a 1x3″ irregular scar posterior to the medical [35] *mallealus*. This scar was somewhat tender to touch, apparently because of a neuroma of the posterior tibial nerve. There was a 4½″ longitudinal healed surgical scar posterior to the lateral malleolus and distal portion of the fibula which was also tender to palpation, apparently because of a neuroma of the seral nerve. There was a 2″ transverse scar on the dorsum of the left foot over the etatarsal heads. This scar was non-tender. There was a 1″ scar over the medial aspect of the left foot which also was non-tender but somewhat adherent. There was a callus on the medial aspect of the left great toe and a large callus with some evidence of hemorrhage beneath the head of the 5th metatarsal, left. There was an excoriation beneath the head of the

1st metatarsal left. The cutaneous sensation was altered as follows: There was marked hypersthesia (increased sensitivity) distal to the lateral malleolus and over the lateral aspect of the foot and the lateral aspect of the dorsum of the left foot. There was marked hypesthesia (decreased sensitivity) over the entire plantar surface of the left foot. X-rays of the left foot reveal several small radio opaque foreign bodies, probably metallic fragments, in the region of the medial malleolus.

"In my opinion this man has a well-healed fracture of the 1st metatarsal, right, with ½" shortening. This has produced disordered weight bearing, resulting in a depression of the metatarsal arch and the longitudinal arch. This is a permanent [36] disability of a mild type. In my opinion, he has had damage to the posterior tibial and seral nerves of the left foot and leg in the region of the ankle, and at the present time has a neuroma of these nerves at the ankle region with loss of nerve fibers to the plantar surface of the foot. Because of this loss of sensation to the foot, it is expected that the trophic ulcerations which he has had in the past will recur. I believe this disability is permanent and severe enough in nature to prevent this man from engaging in any activity in the future which will require standing or walking for more than minmal periods at a time."

The Court: The summary of your theory on damages and the testimony in support thereof, as referred to in the transcript, is embraced on page 13 of your opening brief and the resume you

handed me today, the computation, is substantially, the same, is it not, counsel?

Mr. Bloom: Yes, your Honor, except in going over the transcript a few nights ago I notice I had omitted one or two operations on the man.

The Court: I noticed he had five operations in all.

Mr. Bloom: He had seven, really. He had seven operations. Dr. Morrissey, for example, operated on the seral nerve twice, at his office and later took out some shrapnel fragments from the heel—well, from some place in the foot. In any event, there were seven operations instead of five. Aside from that I [37] think it is substantially accurate.

The Court: The matter may stand submitted, gentlemen.

Mr. Bloom: If your Honor please, do I understand that counsel has no objection to the introduction of this——

Mr. Scholz: No objection to your reading from the United States actuary tables.

The Court: We will recess until 2:00 o'clock.

(Whereupon a recess was taken until 2:00 o'clock p.m.) [38]

REPORTER'S TRANSCRIPT

Plaintiff's Motion to Complete Record

Wednesday, October 3, 1951

The Clerk: White vs. United States of America.

Mr. Scholz: If your Honor please, we can see no particular objection to the order Mr. Bloom

sent to us was that we stipulate to the filing of the wants here. The only objection was, the stipulation second amended complaint, and the office of the United States Attorney, and myself in particular, felt that we couldn't do that. That came up at the last minute. Your Honor did make an order at that time that it could be filed, but we didn't feel that we could stipulate to it.

As far as the letter that he wants to introduce, it would seem to me, personally, that he should have it before your Honor so you can fix the responsibility or the ultimate judgment to be obtained by the lienholder or Mr. White himself.

Mr. Bloom: If your Honor please, the motion was directed to the point of having an order confirming the order admitting the filing of the second amended complaint. We wanted it clarified. The reason for it, I think, is apparent when you read my affidavit in support of the motion. I don't think that the record is entirely clear on that point, particularly since the government has seen fit not to sign the stipulation in question. So, first of all we are going to ask your Honor for the formal order now confirming the figure, and reaffirming the figure of the second amended complaint. [2*]

The Court: I will make such an order. Do you have a formal order?

Mr. Bloom: Yes, I have. Now, in respect to the letter that sets for the arrangement between the Industrial Indemnity Company, the plaintiff and ourselves; we representing both the insurance carrier and party plaintiff. I think it may be helpful to

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

your Honor in the matter of a judgment, so, there being no objection from counsel I now offer in evidence this letter of September 19, 1951, and ask that it be marked Plaintiff's Exhibit next in order.

The Court: So ordered.

The Clerk: Plaintiff's Exhibit next in order admitted in evidence.

(Thereupon, the letter above referred to was admitted in evidence and marked Plaintiff's Exhibit next in order.)

Mr. Bloom: We now tender, if your Honor please, the proposed order which is in accordance with the order attached to the notice of motion and it calls for the reopening of the case for this purpose, and for the granting of the order, for the admission of the letter in evidence and for the affirmation and reissuance of your Honor's opinions and orders for judgment which are now on file.

The Court: All right, I will have the order submitted. [3]

[Endorsed]: No. 13226. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. John Phillip White, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 9, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 13,226

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

JOHN PHILLIP WHITE,
Appellee.

APPELLANT'S OPENING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Statutes

Texts

Rules

No. 13,226

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

JOHN PHILLIP WHITE,
Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

Originally, this action was instituted in the United States District Court for the Northern District of California, Southern Division, under the Federal Tort Claims Act, Title 28, U.S.C., Sections 1346(b) and 2671-2680. Following trial and judgment in favor of plaintiff, this appeal was commenced in the United States Court of Appeals for the Ninth Circuit, pursuant to Rule 73 of Federal Rules of Civil Procedure and Title 28 U.S.C., Sections 1291 and 1294.

STATEMENT OF THE CASE.

(All page references are to the printed transcript of record, unless otherwise noted.)

On November 22, 1946, John Phillip White, appellee, while at Camp Beale, Marysville, California, was injured by the explosion of a dud ammunition projectile located on that military reservation. At the time of the accident, appellee was removing scrap metal from the artillery strafing range located at Camp Beale. Appellee was present at this military reservation pursuant to a written contract executed between his employer, Mars Metal Company, a copartnership and the United States of America, through the Quartermaster Corps of the United States Army. The contract in question (Plaintiff's Exhibit No. 1) called for the removal by the appellee's employer of expended nonferrous shells from the various artillery ranges on Camp Beale. Prior to the time that appellee's employer entered into the contract with the United States Government, appellee, as representative and as an agent of his employer, had on two occasions visited Camp Beale for the purpose of determining the existence and extent of scrap metal on that military reservation. Appellee's original visit to Camp Beale was in September, 1946 (Tr. pp. 9 and 100), and again on October, 1946 (Tr. p. 108). On each visit, appellee discussed the manner of gathering scrap metal with the Range Officer, Captain Jones, and thereafter was taken on a personal tour of the various ranges by an assistant of Captain Jones, a Sergeant Hodges (Tr. pp. 101-107-109). Appellee secured and hired the services of several military personnel, who were off duty, to aid him in the collecting of the scrap metal (Tr. p. 114).

On the date of appellee's accident, November 22, 1946, which was his third day of collecting scrap metal at Camp Beale (Tr. p. 119), he was accompanied by one of his employees, a Private Lang, who was off duty, but who was attached to the Military Police at Camp Beale. On this occasion, appellee and Private Lang were working on the strafing range at Camp Beale in close proximity to one another. Private Lang, in his work of collecting scrap metal, picked up a piece of metal which appeared to the appellee to be iron and not the type that he desired to salvage. Private Lang after requesting appellee if he desired to salvage this type of metal (and being told, "no"), tossed the piece of metal to appellee (Tr. p. 120), who attempted to catch it, but was unable to do so, dropping the metal to the ground. The metal, upon being dropped by appellee, exploded, injuring the appellee and Private Lang. The metal that was discovered by Private Lang and thrown by him to appellee was, as far as can be determined, a 37 millimeter anti-personnel projectile (Findings XI, Tr. p. 67). As a result of the accident in question appellee suffered personal injuries.

PROCEEDINGS IN TRIAL COURT.

Appellee filed his Complaint for Damages in the United States District Court, Northern District of California, Southern Division, on November 12, 1947 praying for general and special damages aggregating the sum of $36,973.00 (Tr. p. 3). Thereafter on October 2, 1950, appellee filed his First Amended

Complaint amending and increasing his prayer for general and special damages to $60,028.39 (Tr. p. 13). On July 11, 1951, appellee filed his Second Amended Complaint again increasing and revising his general and special damages praying for judgment against appellant in the sum of $63,881.19 (Tr. p. 46).

Trial on the merits of this action was commenced in the honorable District Court for the Honorable George B. Harris on November 2, 1950. After due hearing on the merits and the reopening of the case to determine the question of damages, judgment was rendered in favor of appellee, John Phillip White awarding damages to him as follows: Special and general damages the aggregate sum of $55,081.19 payable in the following manner:

To the Industrial Indemnity Company, a corporation, on a subrogated claim of lien for medical and hospital expenses under the Workman's Compensation Law of the State of California, the sum of $3722.11, together with attorneys' fees in the sum of $930.53.

To Messrs. Huberman & Bloom, Attorneys for appellee, attorneys' fees in the sum of $11,016.24.

To John Phillip White, balances of said judgment after the deduction of the above items or a total of $40,432.84 (Conclusions of Law 11 and 12, Tr. p. 77; Judgment, Tr. pp. 79-81).

QUESTIONS RAISED ON APPEAL.

The appellant does herewith specify the following statement of points to be relied upon on appeal:

That the trial court erred

1. In finding that John Phillip White was not guilty of contributory negligence;

2. In giving plaintiff judgment in view of the fact that there is no proof of any negligence of any employee of the United States, or that plaintiff failed to connect an employee of the United States with the alleged negligence;

3. In finding that the clearing of the alleged dud area was not a discretionary act and hence within the exceptions of the Federal Tort Claims Act;

4. The failing to find that the plaintiff assumed the risk of his undertaking;

5. In failing to find that the United States was not under any obligations to keep the premises in a safe condition for licensees.

6. In finding that the United States was negligent, although there is no allegation of negligence as to any particular employee of the United States in the complaint or proven by the evidence.

7. In failing to find that the defendant had no duty to warn plaintiff of danger likely to be encountered by him; that defendant did warn plaintiff of possible danger;

8. In failing to find that the defendant was not obligated to make a careful or any inspection of the

premises in order to locate any danger which the plaintiff might encounter;

9. In failing to find that plaintiff's own employee was a direct or proximate cause of the damages or that the same was in the nature of an intervening cause;

10. In failing to find that plaintiff's own employee, a soldier, was the agent of plaintiff, and that said soldier was not acting within the scope of his employment;

11. In failing to find that the United States had no actual knowledge of any duds;

12. In finding that the Industrial Indemnity Company of San Francisco was entitled to $3722.11 or any sum whatsoever in this case.

ARGUMENT.

POINT I.

Specifications 1, 9, and 10 of Points to be relied upon by appellant in this appeal will be here jointly discussed.

Said points are to be as follows:

1. In finding that John Phillip White was not guilty of contributory negligence;

9. In failing to find that plaintiff's own employee was a direct and proximate cause of the damages or that the same was in the nature of the intervening cause;

10. In failing to find that plaintiff's own employee, a soldier, was the agent of plaintiff, and that said

soldier was not acting within the scope of his employment.

Appellant respectfully calls to the attention of this Honorable Appellate Court, the fact that the wording set forth in appellant's point 10 of points to be relied upon on appeal is not correctly stated and in effect the correct specification is *"that the plaintiff's own employee was the agent of plaintiff and that said soldier 'was' acting within the scope of his employment."* (Emphasis added.)

WAS APPELLEE GUILTY OF CONTRIBUTORY NEGLIGENCE?

Referring to the Honorable Trial Court's findings that appellee was not guilty of contributory negligence (Conclusions of Law 10, Tr. p. 77), appellant respectfully submits that this finding is unsupported by the evidence. Obviously, the trial court did not take cognizance of the fact that Private Lang, who pitched or threw a "chunk of iron" at appellee causing appellee to drop it and thereby to explode, was in fact an agent and an employee of appellee (Tr. pp. 120 and 121). Likewise, it was very apparent from the evidence that at the time this explosion occurred, Private Lang was acting as an employee of appellee, and working within the scope of his employment.

It cannot be conceived that the act of Private Lang towards appellee was anything but negligent. His conduct was certainly not of a prudent nature. Lang as a soldier was aware of, or as a member of the personnel of Camp Beale should have been aware of the

existence of duds and unexploded missiles within the area which he was working with appellee. It is not unreasonable to assume that Lang, as a trained soldier, skilled and trained in matters of ammunition, should have known that to throw or toss metal, looking like and having the appearance of expended artillery ammunition, might cause it to explode and injure appellee. Lang subsequent to the accident, admitted in writing that the iron chunk looked like a live shell (Defendant's Exhibit D). The record in this particular regard leads the appellant to the belief that the negligent act of Private Lang towards appellee proximately contributed to his injury, irrespective of any negligence theretofore existing on the part of the United States or any of its agents, or employees acting within the scope of their authority or employment which is not now conceded or admitted.

Thus, if appellee's agent, while acting within the scope of his authority was negligent towards appellee and such negligence contributed proximately to the injuries complained of by appellee the negligence of Private Lang towards appellee barred his recovery, such negligence being imputed to appellee and constituting contributory negligence on his part.

> "It is well established that one cannot recover damages for an injury negligently inflicted upon him when the injury is proximately contributed to by the negligence of his own servant, agent, or representative who at the time is engaged in the business of his employment, or, as commonly said, is acting within the scope of his authority. In such case, the principal is chargeable with con-

tributory negligence of his agent or servant and has no cause of action against a third party any more than if that contributory negligence had been his own personal act."

38 *American Jurisprudence* p. 922, sec. 236;
Krebs Pigment & Chemical Co. v. Sheridan, 12 Fed. Supp. 254, affirmed 79 Fed. 2d 479.

WAS THE ACT OF PRIVATE LANG IN THROWING THE IRON SHELL AT APPELLEE THE DIRECT AND PROXIMATE AND INTERVENING CAUSE OF APPELLEE'S INJURY?

To this question the evidence clearly discloses an affirmative answer. It cannot be doubted that Private Lang's conduct towards appellee was negligent, contrary to the Honorable Court's findings as to such an act being normal and natural and not an intervening cause (Findings of Fact XI, Tr. p. 68, Conclusions of Law 8, Tr. p. 76). Private Lang's act of negligence alone caused appellee's injury. Appellee cannot argue that if Lang had not picked up the piece of metal and had not tossed it to him, he would still have sustained the injuries of which he suffered. No act or conduct on the part of appellant caused the metal to explode. In the first instance, appellant calls to this Honorable Court's attention the fact that the instrumentality at the time it caused appellee's injury was not under appellant's control nor under the control of any of appellant's agents, servants, or employees acting within the scope of their employment or authority, but was, in fact, in the possession, control and custody of appellee's own agent.

Secondly, to place the legal burden of foreseeability on the United States as to the act and conduct of Private Lang would amount to placing an unreasonable duty and task upon appellant. In the firing of ammunition, the United States, through its agents and employees in the United States Army at Camp Beale could not in the exercise of reasonable and due diligence foresee or be placed with the burden of foreseeing that Private Lang, a soldier, who at the time of the accident was privately employed, would discover the unexploded shell and thereafter with complete disregard for the welfare of himself and his employer, who was in the immediate vicinity, toss or pitch the unexploded missile at his employer causing it to explode and bringing about injuries both to himself and the appellee. Such action by Private Lang is too remote to be anticipated or foreseen by appellant and such conduct by Private Lang constituted a new efficient and intervening negligent act that solely, directly and proximately caused and contributed to appellee's injuries, irrespective of any prior negligence on the part of appellant.

The doctrine of foreseeability cannot be extended to the point announced and proclaimed by the Trial Court in the instant case. Assuming that prior to the accident causing appellee's injury, appellant was negligent in his conduct and duty towards appellee in allowing unexploded duds and missiles to remain on the military ranges at Camp Beale without their being deactivated and decontaminated. Such negligence had only a casual connection with appellee's injuries. Con-

tinuing on the bare assumption that the appellant was negligent towards appellee, its negligence amounted only to the circumstance and not the cause of appellee's injuries. Appellant's act in leaving or allowing an undiscovered dud to remain on the strafing range at Camp Beale, at the most, furnished the opportunity for appellee's injury but not the result.

Therefore, appellant from the evidence, did nothing actively, affirmatively or immediately to bring about appellee's injury. The sole and proximate cause of appellee's injury was the act and conduct of Private Lang in throwing the unexploded shell to appellee. Lang was or should have been aware of the potential danger of the missile and, by not acting in accordance with the potential danger, proximately and solely caused appellee's injury.

Stewart v. United States, 186 Fed. 2d 627;
Schmidt v. United States, 179 Fed. 2d 724;
Hauser v. Pacific Gas & Electric, 133 Cal. App. 223 at 226.

To impose upon the appellant the task of anticipating, awaiting or foreseeing the conduct of Private Lang is to place a responsibility or duty upon the United States to guard against actions and conduct that is considered unusual, unlikely to happen and slightly probable. Such a burden is not the law. The occurrence of such unusual, unlikely or improbable actions is sufficient to relieve the appellant of liability towards appellee assuming in the first instance that there was negligent conduct by the appellant and towards the appellee. It is on this basis that appellant

asserts and submits that the trial court erred in its conclusion that the act of Private Lang was not an intervening cause relieving appellant of its negligence towards appellee (Findings of Fact XI, Tr. p. 68).

QUESTION.

WAS PRIVATE LANG AN EMPLOYEE OF APPELLEE AND ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT AT THE TIME APPELLEE SUFFERED HIS INJURY?

On this point, the evidence is sufficiently clear to establish that at the time appellee was injured, Private Lang was acting as his employee. Appellee in his direct examination, admitted to the fact that he hired (Tr. pp. 118-119) Lang's employment for the purpose of aiding appellee in the recovery and salvaging of scrap metal which he was doing at the time of the explosion of the dud (Tr. p. 121). In addition, at the time of the accident, Lang was under the supervision of the appellee and subject to his control (Tr. p. 121). Continued and further argument on this point would be tedious and cumulative.

POINT II.

In an attempt to further simplify its argument, appellant jointly discusses herein Point 2 and Point 6 of its statement of its points to be relied upon on appeal. These specifications of error are:

2. In giving plaintiff judgment in view of the fact that there is no proof of any negligence of any em-

ployee of the United States, or that plaintiff failed to connect an employee of the United States with the alleged negligence;

6. In finding that the United States was negligent although there is no allegation of negligence as to any particular employee of the United States in the complaint or proven by the evidence.

Did the evidence show any negligence on the part of an employee of the United States, or did the plaintiff by its evidence show or connect any employee of the United States with the alleged negligence of appellant?

At the outset, it must be stated that under the Federal Tort Claims Act, in order for appellee to recover, there must be proof by the preponderance of the evidence that the United States was liable to appellee for his injuries because of negligence occasioned or which occurred through an agent, servant or employee of the government acting within the scope of his employment or authority (Tit. 28 U.S.C. 1346(b) 2671-2680).

In Re Texas City Disaster Litigation, 197 F. 2d 771.

This doctrine of liability to the United States for the negligent acts of its employees is based upon the doctrine of *respondeat superior.* In the instant case, the record is devoid of any showing of an omission or course of conduct of any identifiable government employee acting within the scope of his authority constituting negligence of the appellant.

Lauterbach v. United States, 95 F. Supp. 479.

From the record, appellant must come to the conclusion that the Trial Court's findings and judgments were predicated upon the fact that an unexploded missile was located on a military reservation of the United States, and not removed therefrom so as to avoid injuries to any persons legally entitled to be present upon said military reservation. Appellant cannot hold with this apparent legal principle so announced by the Honorable Trial Court. Mere possession or control of a dangerous instrumentality does not bring into existence the *respondeat superior* doctrine of liability as pronounced in the Federal Tort Claims Act. Possession of such an instrumentality such as an unexploded shell alone and in and of itself is not sufficient to establish liability on the part of the United States toward appellee.

United States v. Campbell, 172 Fed. 2d 500, cert. denied 377 U.S. 957;

United States v. Eleazer, 177 Fed. 2d 914, Cert. denied, 339 U.S. 903.

The mere happening of the accident which caused the appellee's injury is not sufficient to establish negligence which can neither be presumed nor inferred.

In the instant case, nothing is shown to indicate that any government employee was negligent in discovering or ascertaining the location or whereabouts of the explosive that caused the appellee's injury. Neither is it shown that the failure to discover such an explosive was negligence.

In all of his dealings with the United States Government appellee dealt with only two members of the

military personnel of Camp Beale, namely, Captain Jones and Sergeant Hodges. There is nothing in the record indicating how and in what manner either Sergeant Hodges or Captain Jones were negligent in causing or bringing about the injuries suffered by the appellee. The evidence, however, does show that in the course of his employment, Captain Jones, as the Range Officer at Camp Beale, took steps to locate and did locate unexploded duds prior to the time that the appellee initially visited Camp Beale and prior to the time that he commenced his salvage operations on that military base. Sergeant Hodges, in a written statement, has stated that all adequate steps were taken to clear the area and neither he nor anyone else to his knowledge knew of the dud's existence (Defendant's Exhibit No. L). The evidence further shows that a survey to ascertain the location of unexploded duds had been conducted by Captain Jones approximately a month prior to appellee's injury. Such a survey so carried out by Captain Jones was in accordance with the standard procedure carried on at Camp Beale for the purpose of locating duds (Tr. pp. 229; 254-255; 260-261 and 269). It must be respectfully called to the Court's attention that the mere presence of unexploded shells or duds on Camp Beale, after steps had been taken to ascertain their location, in conformity with standard procedure, does not constitute negligence on the part of an employee of the United States so as to allow a recovery by the appellee under the Federal Tort Claims Act.

Denny v. United States, 185 Fed. 2d 108;
Madden v. United States, 76 Fed. Supp. 41.

POINT III.

This portion of appellant's argument deals with Point 3 of its statement to be relied upon on appeal, namely, that the Trial Court erred in finding that the clearing of the alleged dud area was not a discretionary act and hence within the exceptions of the Federal Tort Claims Act.

In all actions brought under the Federal Tort Claims Act, the government is relieved of liability under Section 2860(a), Title 28 U.S.C., for injuries caused to third persons if the injury results in the exercise of a discretionary act.

The Trial Court in its Findings (Findings VIII, Tr. p. 85) and its interrogation of appellant's witness, Captain Jones (Tr. p. 288) placed great stress upon the manner and method in which the United States Army carries out its dedudding program at Camp Beale and appellant's failure or refusal to use mechanical sound devices to carry out this work. Reference is made to War Department Circular I-195 (Plaintiff's Ex. No. 12, Tr. pp. 215 and 216) as being the criterion and standard guide in the removing and neutralizing unexploded ammunition or duds on military reservations. This circular merely requires of the commandant of military reservations the removal or neutralizing of such ammunition or duds "so far as practical". Nothing is stated in the directive or required thereby as to how and in what manner and through what means, implements, devices, or instrumentalities, the neutralizing or removing process was to be accomplished. The means of accomplishing the

dedudding program was the discretionary act of the commandant of each military reservation where such a program was to be carried out. That this program was discretionary at Camp Beale was the uncontradicted testimony of Captain Jones (Tr. p. 289). The procedure of effecting the dedudding process had always been considered a discretionary one.

Appellant calls to the Honorable Court's attention the answers of Captain Charles D. Pitre to plaintiff's interrogatories (Defendant's Exhibit No. I), who testified in effect that the decontamination program at Camp Beale was carried out in accordance with accepted methods of the United States Army pursuant to its regulations. This testimony fortifies appellant's contention that the dedudding operations at Camp Beale was no more than a discretionary function of appellant acting through its agents, employees and military personnel on the military reservations, in question.

Although there are many decisions dealing with the discretionary exception to the Federal Tort Claims Act, there is little said or expressed by the Courts as to what exactly constitutes an act of discretion so as to bring appellant under the relief of liability announced in Section 2680(a) of the Federal Tort Claims Act. Simply stated: "an act of discretion" arises when an act may be performed in one or two or more ways either of which would be lawful and where it is left to the will or judgment of the performer to determine in which way it shall be performed.

27 *C.J.S.* page 134;

Markall v. Bowles, 58 Fed. Supp. 463.

Appellant earnestly urges that the rejection by the District Engineer of the Corps of Engineers in employing or using mechanical sounding devices to clear the artillery ranges of Camp Beale of unexploded projectiles and in the aid of the dedudding program of this military base pursuant to War Department Circular I-195, was discretionary.

The evidence discloses that previous dedudding practice at Camp Beale was by eye-sight and military personnel traversing the various fire-ranging areas marking discovered duds which are to be later removed or demolished by trained demolition crews (Tr. p. 261).

If the United States through the District Engineers determined that the previously employed practice of dedudding was the most practical means of effecting the decontamination of Camp Beale and that such a practice and operation previously employed was lawful, its decision not to follow a second and more expensive means of dedudding was a lawful decision unfettered by any known statutes or regulations thereby relieving appellant from any liability to appellee as a result of his injuries occasioned by the decontamination and dedudding practice at Camp Beale.

Kendrick v. United States, 82 Fed. Supp. 430;
Toledo v. United States, 95 Fed. Supp. 838;
North v. United States, 94 Fed. Supp. 824;
Coates v. United States, 181 Fed. 2d 816;
Old King Coal Co. v. United States, 88 Fed. Supp. 124.

POINT IV.

Appellant does here discuss Point 4 of its statement relied upon on appeal, namely, that the Court erred in finding that the plaintiff assumed the risk of his undertaking.

The Honorable Trial Court at the conclusion of the trial on the merits held that appellee did not assume the risk of his injuries when he became engaged in salvaging metal on the firing ranges at Camp Beale (Memorandum Opinion, Tr. p. 43, Findings of Fact, Tr. p. 69, and Conclusions of Law 9, Tr. p. 76).

Appellee's own testimony is to the effect that on his initial visit to Camp Beale and his inspection of the Camp's strafing range, where the accident in question occurred, appellee was told by Sergeant Hodges of the existence of an anti-tank projector located thereon (Tr. p. 105). He was further warned by Sergeant Hodges of the existence of duds or explosives in the area of the strafing range (Tr. p. 106). Appellee was shown a marked projectile or dud in the strafing area (Tr. p. 106). On his second visit to Camp Beale, appellee was warned by Captain Jones about cast iron projectiles of a type shown to him as having metal gilding around it (Tr. pp. 105 and 112). The type of projectile which was demonstrated to appellee by Captain Jones was in appearance similar to the one that Private Lang picked up and threw at appellee (Tr. p. 121). Appellee by his own testimony, was warned by Captain Jones of the existence of marked duds and to be careful of approaching them (Tr. p. 113). In the contract entered into between appellee's

employer and the United States government which was in fact executed by appellee in behalf of his employer (Plaintiff's Exhibit No. 1), it is specifically stated on the face of the contract that the contracting party should be the sole judge as to the area to be worked and to the extent of work to be done and that the removal of scrap metal was to be done "as is, where is". Appellee in a sworn, written statement stated, "I knew there were 'duds' out there" (Defendant's Exhibit A).

On this basis with previous knowledge of the existence of possible explosives and the admonition of two members of the military personnel of Camp Beale as to the possible existence of unexploded projectiles, it is appellant's contention that appellee, when he entered Camp Beale to pursue his salvaging operation, assumed the risk of the dangers to which he was forewarned and of which he had knowledge.

Appellant further submits to this Honorable Court's attention the testimony of Captain Pitre in answer to plaintiff's written interrogatories (Defendant's Exhibit No. I), wherein the Captain uncontradictedly testified to having given eleven separate warnings to appellee of the danger and possible existence of unexploded duds in the area in which he was to work. Captain Jones' testimony is likewise uncontradicted as to his having warned appellee of the possibility of unexploded shells on the ranges and not to approach such shells or questionable missiles (Tr. p. 237). Appellee testified that while he was salvaging metal on the various ranges, he warned his employee of a

marked dud and extended the approached radius around that dud (Tr. p. 118). Captain Jones further testified that there were numerous warning signs to the public as to the danger area and not to disturb any projectiles that they should discover (Tr. p. 240).

With all evidentiary facts before the Honorable Trial Court, uncontradicted as they were, the Trial Court rejected appellant's defense of assumption of the risk.

Appellee was clearly apprised of the existence of possible explosives (Tr. pp. 236-237). He must have appreciated, or should have, as a reasonable and normal individual, appreciated the hazard or danger then existing. In fact, he admitted knowledge of the danger (Defendant's Exhibit A). However, despite appellee's awareness of this danger, he continued to expose himself to a condition that was nothing less than hazardous. The risk of finding or touching unexploded projectiles was an incident of his employment. Appellee was getting scrap ammunition metal on an artillery range. As a person endowed with ordinary faculties, he should have anticipated, have been conscious of and known of the danger then existing from the facts given to him prior to the commencement of his work. Appellee further exercised no caution when he came face to face with the dangerous instrumentalities that caused his injury. The projectile that exploded had "a small piece of gilding metal on it" (Tr. p. 121). The dud that Sergeant Hodges showed appellee on his initial visit to Camp Beale and which was marked and later remarked by appellee, had a similar appearance (Tr. p. 105).

From all of these facts, appellant submits that when appellee commenced work at Camp Beale, pursuant to a contract to remove scrap metal "as is, where is", and in a manner in which he was to be sole judge, he assumed the risk of encountering unexploded projectiles and the possibility of being injured thereby.

Gleason v. Fire Protection Engineering Co., 127 Cal. App. 754;

Grassie v. American La France, 95 Cal. App. 384;

Goetz v. Hydraulic Press (Brick) Co., 320 Mo. 580, 60 A. L. R. 1064;

Weaver v. Shell Co., 34 Cal. App. 2d 713 at 721-722;

Ziesemer v. McCarthy, 71 Cal. App. 2d 378;

Hayes v. Richfield Oil, 38 A. C. 427;

Bazzoki v. Nance's Sanitorium Inc., 109 A. C. A. 246.

POINT V.

At this juncture of appellant's argument, appellant jointly discusses Points 5, 7, and 8 of its statement of points to be relied upon on appeal. The points subject to discussion herein are as follows:

5. In failing to find that the United States was not under any obligation to keep the premises in a safe condition for licensees;

7. In failing to find that defendant had no duty to warn plaintiff of danger likely to be encountered

by him; that defendant did warn plaintiff of possible danger; and

8. In failing to find that the defendant was not obligated to make a careful or any inspection of the premises in order to locate any danger which the plaintiff might encounter.

In the interest of time, appellant concedes that its contention in Point 5 that appellee was a licensee is in error and appellee was, in fact, a business invitee while at Camp Beale. Appellant concedes that as appellee was a business invitee upon its premises, appellant was under certain legal duties of care towards appellee. The duty of care imposed upon appellant was to keep the location where appellee was to work in a reasonably safe condition. Appellant was under no duty to act as an insurer for appellee's well-being, but only to use ordinary care in the protection of appellee. If then the existence of an unexploded shell constituted danger to appellee, and appellant knew of the existence of such danger, appellant was under a duty to warn or apprise appellee of that condition. The evidence is uncontradicted that appellant through its agents, Sergeant Hodges, and Captain Jones, did warn appellee of the existence of such a possible danger or hazard (Tr. pp. 106-112, 236 and 237). Having warned appellee of the possibility of a latent or concealed danger, appellant thereafter became relieved of responsibility towards appellee in the absence of a showing of any wilful or wanton conduct by appellant towards appellee.

See

Blodgett v. Dyas, 4 Cal. 2d 511;
Mautino v. Sutter Hospital Ass'n., 211 Cal. 556.

If the danger that existed on appellant's military reservation was obvious to appellee and appellee believes that such danger was obvious by the existence of marked duds on a strafing range which appellee was shown prior to the commencement of his salvaging activities (Tr. p. 106) and which he later remarked (Tr. p. 118) and which appellant admitted he knew existed (Defendant's Exhibit A), then appellant was under no duty to warn appellee of such an obvious danger.

Ambrose v. Allen, 113 Cal. App. 107;
Royal Insurance Co. v. Mazzei, 50 Cal. App. 2d p. 549.

Irrespective of whether there was a duty imposed upon appellant to warn or make appellee aware of the obvious danger of unexploded projectiles is of no consequence here as such a warning was given as disclosed by the evidence and in contradiction to the Honorable Trial Court's finding that no such warning was given by appellant to appellee (Finding 9, Tr. p. 65, Conclusions of Law 3, Tr. p. 74).

Dingman v. Mattox (A. & F. Co.), 15 Cal. 2d 622;
Jones v. Bridges, 38 C. A. 2d 341;
Brown v. San Francisco Ball Club Inc., 99 C. A. 2d 484.

Having warned appellee of the possible hazardous conditions and danger and appellee having been

familiarized and apprised of this danger, appellant contends that it was under no further duty to take affirmative steps to protect the well-being and welfare of appellee except to refrain from any conduct that would be considered wilful and wanton.

Appellant, being aware and cognizant of the fact that appellee was a rational and intelligent individual possessed of normal physical and mental faculties was thereafter justified in believing that appellee would take the necessary steps and exercise caution attendant with the obvious danger of which he had been made aware to protect himself.

Appellant having been imposed with the duty of forewarning appellee as a business invitee of dangerous defect obvious or latent that existed upon its military reservation and having so warned appellee of said condition complied with the duty imposed on it and in the absence of a showing of any wanton or unlawful conduct by it and towards appellee constituting wilful misconduct is relieved of any liability toward appellee for the injury suffered by him.

Referring to point 8 of its statement of points on appeal, appellant admits that this is incorrectly stated. Appellant having already conceded that appellee was a business invitee, there then rested upon appellee a duty of maintaining its premises in a reasonably safe condition and to exercise reasonable inspection to ascertain defects existing on the premises.

Appellant is not in accord with the Honorable Trial Court's ruling that its maintenance of the military

strafing ranges at Camp Beale was not reasonably conducted (Memorandum Opinion, Tr. p. 41). Appellant believes that such maintenance and inspection of its military strafing ranges was reasonable.

There is evidence that prior to appellee commencing his work on Camp Beale, there had been a survey carried out in accordance with long-established operational procedure to locate unexploded duds (Tr. pp. 261 and 262). Duds that were discovered and ascertained during the course of this survey were marked and appellee was warned of their possible existence (Tr. p. 237). Warning notices were posted on the target area admonishing the public of the existence of possible danger (Tr. p. 240; Defendant's Ex. H). The fact that the survey after having been conducted and carried out under normal procedure did not discover the dud that caused appellee's injury is not in and of itself sufficient to impose liability upon the appellant.

Shanley v. American Olive Co., 185 Cal. 552.

POINT VI.

Appellant contends that the Honorable Trial Court erred in finding that the United States had no actual knowledge of any duds.

With the possible exception of the dud Sergeant Hodges showed appellant (Tr. p. 106) and the admonition of Captain Jones that there was a possibility of unexploded projectiles in the area, there is nothing

in the evidence to show that appellant by and through its agents and employees, had any actual knowledge of further duds on Camp Beale and in particular had no knowledge of the existence or location of the dud which caused appellee's injury. Sergeant Hodges' statement (Defendant's Exhibit L) bears out this fact. Neither does the evidence indicate that any further survey reasonably conducted would have disclosed the dud that caused appellee's injury. An invitor of a business invitee is not liable for dangerous conditions on his premises in the absence of a showing that the condition was known or could have been discovered in the exercise of reasonable care and thereafter remedied.

Girvetz v. Boys Market Inc., 91 C. A. 2d 827.

The warning of Captain Jones to appellee that there was "a possibility" of unexploded duds does not constitute the appellant "knowing" of the dud that caused appellee's injury. The evidence is devoid of any inference that a demolition squad or a decontamination team could have located the dud. The projectile that caused appellee's injuries had the appearance of a "chunk of iron" (Tr. p. 121). From the physical appearance of this projectile as it was shown to appellee at the time of his injury, no conclusion can be drawn that a search would have lead appellant to consider this piece of metal a dud.

POINT VII.

In its final specification of error, point 12, appellant asserts that the Honorable Trial Court erred in allowing appellee's employer's Workman's Compensation Carrier, Industrial Indemnity Company, to share in the judgment.

Appellant calls this Honorable Court's attention to the recent decision of *United States v. Aetna Casualty and Insurance Company,* 338 U.S. 366, 94 L.Ed. 171, 70 Supreme Court 207, as its authority to refute the right of the Industrial Indemnity Company, a corporation, to share in the judgment rendered in favor of the appellee. It might well be admitted that the Industrial Indemnity Company was entitled to a right of a subrogee in recovering its payment of medical and hospital expenses paid to appellee. However, as announced in the *Aetna* case, supra, an insurance carrier to be entitled upon a wholly or partially paid claim to share in the judgment rendered against United States under the Federal Tort Claims Act must be a party plaintiff to the action as said insurance company is considered a real party in interest. In the instant case, the Industrial Indemnity Company was a real party in interest, but was not a plaintiff in the action. This insurance carrier was before the court only as a lien claimant, by virtue of two claims of lien filed in its behalf during the course of the trial (Tr. pp. 37-44). In no instance was the insurance carrier's rights to recover or share in the judgment ever litigated by the Trial Court.

The appellant as the sovereign can only be subjected to the claims of private citizens and third persons if it consents to be so liable. Appellant is unaware of any statute or decision that holds that the United States can be liable to a third person under the Federal Tort Claims Act without that party suing the government or joining as a party in interest in a suit pending against the United States. Until such a party becomes an interested person in an action brought under the Federal Tort Claims Act, there can be no adjudication by the Trial Court of its right of recovery or its right to share in any judgment rendered in that action.

Appellant respectfully submits that the Honorable Trial Court erred in giving judgment to the Industrial Indemnity Company in the sum of $3722.11 without said insurance carrier being before the Court as a real party in interest.

CONCLUSION.

In conclusion, appellant respectfully submits that the Findings of Fact and Conclusions of Law and the Judgment rendered by the Honorable Trial Court below in behalf of the appellee, were not and are not in accordance with the facts or the law in that,

a. The manner in which appellant cleared its military reservation of unexploded projectiles and shells was discretionary and within the exceptions of the Federal Tort Claims Act imposing liability upon the government of the United States;

b. That appellee was guilty of contributory negligence imputed to him by the act and conduct of his agent and employee, Private Lang, while acting within the scope of his employment;

c. That the act and conduct of Private Lang towards appellee while working in his behalf constituted a new efficient intervening, sole, and proximate cause of the injuries suffered and sustained by the appellee;

d. Appellee was fully aware, forewarned, and knew of the dangers existing at Camp Beale and the possibility of unexposed dangerous conditions attendant upon the fulfillment of his salvage operations and assumed the risk thereof;

e. Appellant exercised all reasonable caution and care required of it by the law in protecting appellee and warning him of the existence of "possible" dangers upon the firing ranges at Camp Beale;

f. That neither appellant nor its agents, servants, or employees acting within the scope of its employment were in any manner or way negligent toward appellee or did in any manner cause or bring about the injuries suffered by appellee;

g. The Honorable Trial Court erred in awarding judgment to the Industrial Indemnity Company, a corporation, for medical and hospital benefits for and on behalf of appellee without said subrogee joining and participating in the trial below as a party plaintiff having a real party interest.

For the reasons heretofore stated, it is respectfully submitted by appellant that the Trial Court's judg-

ment in favor of appellee should be reversed and an order made and entered by this Appeal Tribunal rendering judgment for and in favor of appellant.

Dated, San Francisco, California,
October 15, 1952.

Respectfully submitted,

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No. 13,226

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

JOHN PHILLIP WHITE,
Appellee.

SUPPLEMENT TO APPELLANT'S OPENING BRIEF.

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SUPPLEMENT TO APPELLANT'S OPENING BRIEF.

Subsequent to the filing of the Appellant's Opening Brief in the instant appeal, it was called to the attention of appellant and its counsel that Exhibit I which the United States has referred to in its appeal brief had been erroneously admitted into evidence at the time of trial of this matter in the District Court and thereby had been erroneously made part of the instant appeal record. In order to rectify this error and to prevent this Honorable Appellate Tribunal from being misled by appellant's reference to this Exhibit, it was stipulated between counsel for the appellant and appellee that said Exhibit I was not to be considered part of the record on appeal and that appellant be

afforded an opportunity to rectify its references to this evidence by a Supplemental Brief.

In order to properly apprise the Honorable Appellate Tribunal as to where appellant has referred to this erroneously admitted Exhibit I, appellant is taking this occasion to specifically set forth said references:

(a). On page 15 of Appellant's Opening Brief, reference is made to a written statement of Sergeant Hodges pertaining to the steps that had been taken to clear the firing range area of duds and said Sergeant's further statement to his knowledge, no one knew of the existence of the duds. This statement is designated as defendant's Exhibit L and does in fact constitute a portion of the documents that comprise the erroneously admitted Exhibit I;

(b). On page 17 of Appellant's Brief, the entire second paragraph thereof, appellant again has referred to Exhibit I with regard to the answers of Captain Charles D. Pitre to plaintiff's written interrogatories regarding the method of conducting the decontamination program of unexploded shells at Camp Beale. This reference was made with respect to Point III of appellant's questions raised on appeal to the effect that the clearing of the alleged dud area was in fact discretionary;

(c). On page 27 of Appellant's Brief, appellant referred once again to the statement of Sergeant Hodges designated as Exhibit L in the Brief which was in fact a part of the erroneously admitted Ex-

hibit I. This reference to Exhibit I was in support of Point VII of Appellant's questions raised on Appeal to the effect that the defendant had no duty to warn the plaintiff of the danger likely to be encountered by him and that the defendant did warn plaintiff of the possible danger.

Appellant concedes that it is not entitled to rely upon these erroneously admitted statements and answers to interrogatories in its Brief or to refer or to use same on the occasion of the oral argument of this appeal.

However, pursuant to the stipulation entered into between counsel for the appellee and appellant, appellant is taking this occasion to supplement its Opening Brief without reference to the erroneously admitted evidence, only to the extent that previous reference to said evidence has affected the contents of Appellant's Brief.

With regard to Point II of Appellant's Brief (Brief ps. 12-15), appellant re-asserts its contention that despite deletion of its reference to Sergeant Hodges' statement, there is ample cited testimony and evidence in this portion of Appellant's Brief to sustain and substantiate its contention that at the time of trial, there was no showing of any negligence on the part of the United States. The evidence is likewise devoid of proof of any negligence on the part of any identifiable employee of the United States so as to bring into being the respondeat superior doctrine of liability of the Federal Tort Claims Act thereby

imposing liability on the appellant for the injuries sustained by appellee. Reference to the complete text of Point II of Appellant's Brief will bear out this fact, irregardless of any statement of Sergeant Hodges.

Insofar as appellant has referred to the answers of Captain Pitre to plaintiff's interrogatories in Point III of its brief, said reference was made only to further substantiate and uphold the appellant's position that the de-dudding program at Camp Beale was discretionary and therefore any injuries arising out of this program was within the exception of the Federal Tort Claims Act.

The question as to whether this de-dudding operation, as carried out at Camp Beale, was or was not discretionary stands or falls upon the contents of War Department Circular I-195 (Appellant's Exhibit No. 12, p. 215-216). From a reading of this directive, there can be no other conclusion drawn that the means "so far as practical" of accomplishing the removal and neutralization of duds was discretionary and rested solely within the sound judgment and discretion of the individual Commandants of the military reservations in question. As can be seen from the record and testimony of Captain Jones (T. 289), the answers of Captain Pitre, now deleted from this appeal record, were merely comulative to plaintiff's contention that the Camp Beale's de-dudding program was discretionary and the absence of said answers of Captain Pitre from this appeal record in no way detracts from appellant's position in this regard.

So far as appellant's reference to the erroneously admitted statement of Sergeant Hodges in Point II of its Brief on page 270, the appellant contends that despite the unavailability of said statement for use in this appeal, there is sufficient evidence in the record to sustain its position that the United States had no actual knowledge of the existence of any duds at Camp Beale. This contention is further strengthened by the fact that the evidence is completely lacking of any showing that the United States through its agents and employees had any actual knowledge of the presence or existence of the unexploded projectile which caused appellee's injuries and which at the time of the explosion had the physical appearance of a "chunk of iron" (T. 121).

Without attempting to further impose upon this Appellate Court, additional argument and citations of authorities, appellant is content to rest its appeal on the authorities and arguments cited in its Opening Brief and supplement herein.

Dated, San Francisco, California,
December 15, 1952.

Respectfully submitted,

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No. 13,226

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,	*Appellant,*
vs.	
JOHN PHILLIP WHITE,	*Appellee.*

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Statutes

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IN THE

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UNITED STATES OF AMERICA,
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JOHN PHILLIP WHITE,
Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The statement of the case on pages 1 to 3 of appellant's opening brief is incomplete in several material respects. The salient facts, taken from the findings of fact of the District Court, are as follows:

This is an action brought pursuant to the Federal Tort Claims Act for personal injuries sustained by appellee John Phillip White on November 22, 1946, at Camp Beale, Marysville, California (Tr. p. 62.) Camp Beale was an Army base owned and operated by the Government (Tr. p. 62). At the time of the accident, and prior thereto, White was an employee of Mars Metal Company of San Francisco (Tr. p. 63). Pursuant to invitation from the War Depart-

ment, Mars Metal Company had entered into a contract with the Government for the purchase of nonferrous scrap metal located on the firing ranges (Tr. p. 63) at a specific price. White sustained his injuries while collecting scrap metal as an employee of Mars Metal Company pursuant to the aforesaid contract (Tr. pp. 63-64). Thus, White was a business invitee working on land owned and operated by the Government pursuant to a contract for the mutual benefit of Mars Metal Company, White's employer, and the Government.

Prior to White's entry on the strafing range where the accident occurred, the Government knew that there was a strong possibility that unexploded shells or duds existed on the strafing range where the accident occurred and knew that the presence of such shells or duds was a condition of extreme danger to any person entering on said range (Tr. p. 64). In fact, one month before the accident, Captain Robert Sumner Jones, the Post Range Officer in charge, had conducted a survey of the Camp Beale firing ranges, and on the basis of his survey, had recommended that de-dudding operations be undertaken (Tr. p. 64). This recommendation was rejected because of the expense involved (Tr. p. 64). The strafing range at the time of the accident was grass covered and visual inspection alone could not detect the presence of hidden duds (Tr. p. 65). Although electrical and other scientific detecting devices were known and available to the Government, they were not used because of the expense thereof (Tr. p. 65).

Not only did the Government fail to provide White with a reasonably safe place in which to perform his work, but the Government also failed and neglected to warn White of the known danger he was likely to encounter (Tr. p. 65). In fact, White was not even warned of the findings made by Captain Jones' survey nor the fact that electrical and scientific detecting devices had not been used (Tr. pp. 65-66).

As a matter of fact, the Government actually represented to White that the strafing area was a safe place on which to work (Tr. p. 66). The sergeant in charge of the strafing range under the Post Range Officer, Sergeant Hodges, actually told White prior to his entry that the strafing range was in a safe condition except for a certain marked dud which he pointed out to White (Tr. p. 66). He told White that the range had not been used for some time and he specifically showed White a solid iron 37mm. non-explosive anti-tank projectile and advised White that he was likely to find many such projectiles on the range (Tr. p. 66). Sergeant Hodges knew that Army personnel was assisting White, but he gave no warning to White other than to admonish White to instruct the personnel to stay away from the *marked* dud (Tr. p. 67).

On November 22, 1946, White and his helpers were engaged in collecting cartridges from the strafing range (Tr. p. 67). While so engaged, one of White's helpers, Private Lang, an off-duty Camp Beale army private, picked up what appeared to be one of the

solid iron 37mm. anti-tank projectiles and asked White whether he was interested in the same (Tr. p. 67). Almost simultaneously Lang pitched or handed the projectile to White, who dropped the same (Tr. p. 67). The projectile was in White's hand but a fraction of a second (Tr. p. 67). He did not have time to grasp or inspect it (Tr. p. 67). The projectile exploded causing injury to Private Lang and to White (Tr. p. 67). The projectile which exploded was apparently a 37mm. anti-personnel projectile with an explosive warhead similar in appearance to the non-explosive 37mm. iron anti-tank projectile shown to White by Sergeant Hodges (Tr. pp. 67-68).

As a consequence of the explosion, White sustained grievous personal injuries of a permanent character requiring recurrent hospitalization and surgery (Tr. pp. 69-70). Appellant offered no contrary medical evidence in the trial court, nor does appellant contest the propriety of the $55,081.19 judgment on this appeal.

ARGUMENT.

We will now answer the specifications of error on which appellant relies:

(1) THE GOVERNMENT WAS GUILTY OF NEGLIGENCE TO WHITE, A BUSINESS INVITEE.

On page 23 of its brief, appellant corrects a fundamental error which it made in the trial court, and now concedes that White was a business invitee, and not

a mere licensee. By so conceding, we assume that the parties are now in agreement as to the basic applicable law governing the Government's duties as a land owner to a business invitee under the Federal Tort Claims Act, to-wit:

(a) The liability of the Government is the same as that of a private individual under applicable California law (28 U.S.C.A. Sec. 1346(b)).*

(b) The Government was obligated to provide White, a business invitee, with a reasonably safe place to perform the contract with the Government (*Freeman v. Nickerson,* 77 Cal. App. (2d) 40).

(c) The Government was obligated to inspect the strafing range for latent or hidden dangers and to remove the same, or to warn White thereof (*Hinds v. Wheadon,* 19 Cal. (2d) 458).

(d) All of these duties had to be fulfilled with the high degree of care commensurate with the extreme danger involved (*Rudd v. Byrnes,* 156 Cal. 636, 640).

(e) In addition to liability for negligence under the foregoing rules, the Government could not represent something as safe which in fact was dangerous to life and limb (*Humphrey v. Star Petroleum Co.,* 110 Cal. App. 15).

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*Pertinent provisions of the Federal Tort Claims Act are printed in the appendix, infra.

Thus, in respect to the application of the Federal Tort Claims Act, this court in the case of *Johnson v. United States,* 170 Fed. (2d) 767 (9th Circ.), said:

> "The Act is a blanket renunciation of Government immunity to suit in the case of certain types of claims specifically enumerated therein and reflects a Congressional intent and purpose so definite and certain that we need not resort to interpretation of various prior statutes which affected piecemeal release of Government immunity from private suits * * * The policy which we think underlies and pervades the whole Act lends weight to the view that a claim of the general character of the one here involved is properly within the orbit of the Act * * *"
>
> (p. 769.)

Similarly, the Supreme Court, in *United States v. Aetna Casualty & Insurance Co.,* 338 U.S. 366, 94 L. Ed. 171, 70 Sup. Court 207, said:

> "In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in Anderson v. John L. Hayes Constr. Co., 243 N.Y. 140, 147, 153 N.E. 28: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.' "
>
> (p. 383.)

A good illustration of the duties of a landowner to a business invitee is found in *Freeman v. Nickerson,* 77 Cal. App. (2d) 40, supra, where the court held liable the owner of an apartment house for injury to a contractor's wife, who threw wood dust down an incinerator chute and suffered burns from the resulting explosion. The court said:

> "Both respondents were, of course, business visitors or invitees on the premises of appellants, and, as the owners of the property, appellants owed respondents the duty to afford them reasonably safe premises and conditions upon which to carry out the purpose of the 'invitation.' (*Dobbie v. Pacific Gas & Electric Co.,* 95 Cal. App. 781; *Sawyer v. Hooper,* 79 Cal. App. 395; *Hinds v. Wheadon,* 19 Cal. (2d) 458)."
>
> (p. 47.)

In *Hinds v. Wheadon,* 19 Cal. (2d) 458, supra, which involved death from the explosion of a dehydrator tank during welding operations, the court stated the rule in this way:

> "The defendants had an obligation, which they do not dispute, to exercise reasonable care in order to make the dehydrator tank safe for the welding operation which Hinds was ordered to perform. Such a duty of care was required because Hinds was invited upon the premises as a business visitor to work upon the tank."
>
> (p. 460.)

In respect to the duty to warn the business invitee, the court in *Freeman v. Nickerson,* supra, expressed this obligation as follows:

"In the fulfillment of such responsibility, it is the duty of the owner to advise the invitee of hidden dangers known to such owner, in instances where such dangers are not reasonably apparent to the invitee. (*Riley v. Berkeley Motors, Inc.,* 1 Cal. App. (2d) 217; *Lejeune v. General Petroleum Corp.,* 128 Cal. App. 404.)"

(p. 47.)

In *Hinds v. Wheadon,* supra, the rule was expressed as follows:

"The invitor's responsibility is not absolute but he is 'required to use ordinary care for the safety of the persons he invites to come upon the premises. If there is a danger attending upon such entry, or upon the work which the person invited is to do thereon, and such danger arises from causes or conditions not readily apparent to the eye, it is the duty of the owner to give such person reasonable notice or warning of such danger.' (*Shanley v. American Olive Co.,* 185 Cal. 552.)"

(pp. 460-461.)

As stated above, the landowner is held to an extraordinarily high degree of care commensurate with the danger involved. The rule has been expressed in the case of *Been v. Lummus Co.,* 76 Cal. App. (2d) 288, as follows:

"When human life is at stake the rule of due care and diligence requires that *without regard to difficulties or expense* every precaution be taken reasonably to assure the safety and security of any person lawfully coming into the immediate

> proximity of the dangerous agency or device which is a peril to others."
> (p. 293.)

Now let us see how appellant seeks to avoid these applicable rules of law:

First, appellant argues that the District Court erred in finding that the Government knew or should have known, of the dangers likely to be encountered, and therefore appellant argues that the Government had no duty to warn White (Br. pp. 26-27). The finding of the District Court is amply supported by the record. The only evidence relied on by appellant is a certain unauthenticated statement by Sergeant Hodges (Br. p. 27) which appellant now concedes was not admitted in evidence (Supp. Br. p. 2). Captain Robert S. Jones, the Post Range Officer, knew that mere ground vibration may detonate a dud (Tr. p. 297) and that the Army considers de-dudding an extra-hazardous operation even for experts (Tr. p. 287). He made a detailed survey of the firing ranges just one month before the accident (Tr. p. 254), and as a result thereof he "assumed that there may be duds" on the strafing range (Tr. p. 270). He asked the Deputy Commander to send out special demolition squads (Tr. pp. 288-289). This recommendation was ignored *because of the cost involved** (Tr. p. 289).

Inspection of the strafing range immediately after the accident revealed the presence on this strafing range of a 61mm. mortar shell (Pl. Ex. 13), five 37mm.

*All emphasis is the author's, unless otherwise indicated.

duds, one 75mm. dud, one small practice bomb, and one 61mm. mortar dud (Pl. Ex. 14). It was a 37mm. dud which caused the accident (Tr. p. 121). Thus, there is ample evidence that the Government should have known of the ultra-hazardous condition of the strafing range.

This was further demonstrated by the admissions made by Captain Jones in a conversation with one of the owners of the Mars Metal Company shortly after the accident. This owner testified as follows:

> "Now, at that point Captain Jones looked over his records and he became very angry and very agitated because he said to the third captain—not Captain Pitre, but to the third captain—that the last report he had was that this firing range was a safe range, that it had been decontaminated.
>
> 'Now,' he says, 'obviously there were marked duds on this field and some that were not marked, and obviously the field was not decontaminated,' and he was not so notified and that there had been an infraction of army rules."
>
> (Tr. p. 161.)

Appellant complains that there is no evidence that the *particular dud* which caused the injury should have been discovered (Br. p. 27). Of course, the law does not impose such an intolerable burden on an injured party. In any event, the evidence here showed that this strafing range was grass covered so that the visual inspection used was insufficient to locate hidden duds (Tr. pp. 279-280), and that scientific electrical

devices, although available, were not utilized *solely because of the expense involved* (Tr. pp. 262-263).

Plaintiff cites (Br. p. 27) in this connection *Girvetz v. The Boys' Market,* 91 Cal. App. (2d) 827, where plaintiff slipped on a banana which had been on defendant's floor, unknown to defendant, for a minute and a half. This case is totally inapplicable to the case at bar, where the army installation was under the exclusive control of the Army (Tr. p. 62). Furthermore, the dud which caused the accident must have been on the strafing range for more than one year (Tr. p. 105).

Second, appellant claims that the District Court erred in finding that White was not warned of the dangers likely to be encountered (Br. pp. 23, 24).

The record fully supports this finding. Prior to his entry on the strafing range, Sergeant Hodges merely called White's attention to one *marked* 75mm. artillery shell which he called a "freak" (Tr. p. 197). He told White that the strafing range had not been used for more than one year (Tr. pp. 104-105), and that this range had theretofore been decontaminated and rendered safe (Tr. p. 107). He showed White a solid iron 37mm. anti-tank projectile and advised him that he would find many on the strafing range (Tr. p. 105). This was a dangerous representation because the projectile which caused the explosion appeared to be a solid iron one, whereas it actually was a 37mm. anti-personnel projectile with an explosive warhead (Tr. p. 121). On a second visit before the accident, Hodges again told White and his fiancee that the strafing range

was perfectly safe, and he permitted both of them to wander over the range on foot (Tr. pp. 109; 213).

Captain Charles D. Pitre, the contracting officer, likewise failed to warn White of danger on the strafing range (Tr. pp. 110-111).

White had told Captain Jones, the Post Range Officer, that he was confining his efforts to the *strafing range* where the nonferrous metal was located, as distinguished from the artillery ranges (Tr. p. 113). Captain Jones, himself, testified that White "rather clearly" told him that he was interested in non-ferrous metal only and not in the ferrous metals found in the artillery impact areas (Tr. pp. 235; 256-257). Jones called White's attention to the *marked dud* on the strafing range, but said nothing about any other potential danger (Tr. pp. 113; 195-196). *Jones conceded that his warning to White was confined to the artillery impact areas* (Tr. p. 265; Def. Ex. G). In order that there be absolutely no confusion in what Jones meant by "artillery impact areas" he was asked to mark these areas "A" and "B" on the War Department map (Tr. p. 252; Pl. Ex. 15), and he testified that these ranges were "many miles" from the strafing area, which he had marked "X" (Tr. p. 292).

Jones also failed to warn White in other vital respects. For example, he failed to tell him that there had been no use of scientific electrical or mechanical equipment to locate duds on the strafing range (Tr. p. 278). He did not recall whether he had even told

White of the findings of his October survey (Tr. p. 297).

Appellant refers to certain warning signs posted in the target area (Br. p. 26). The evidence, however, shows that the signs were merely warnings to the *general public* that they were entering upon the firing range area and should stay on the traveled roads (Tr. pp. 266-267). Such signs obviously have nothing whatsoever to do with a business invitee specially invited to enter upon a particular range.

Third, appellant assumes that the danger was obvious to White because he knew of the presence of *one marked artillery dud* on the strafing range (Br. p. 24). This is a false assumption. We have already seen that this was a virtual trap, because the particular dud was called a "freak" and the range was represented as being otherwise free from danger. In response to the warning of the *marked* dud, the record shows that White was meticulously careful in protecting his helpers and himself from this danger (Tr. p. 118). He went to great lengths in this respect. White said:

> "Originally there was a stick with a rag on it and I didn't want any trouble, and so I put some rocks which were available at a radius of 20 to 25 feet and told the men, 'Don't even go inside the radius' " (Tr. p. 118).

The cases cited by appellant on pages 24 and 26 of its brief state correct principles of law in respect to known or obvious dangers. We have no quarrel with

these cases, but they clearly constitute no authority here where the danger was hidden and where White in fact was assured that the area in which he was to work was perfectly safe. Thus, in *Blodgett v. Dyas,* 4 Cal. (2d) 511, the plaintiff deliberately stepped into a stairway clearly in front of her very eyes. In *Mautino v. Sutter Hospital Association,* 211 Cal. 556, where a nurse slipped on a hospital floor, judgment for plaintiff had to be reversed because the instructions in effect held the defendant to be an insurer and held that contributory negligence should be disregarded. In *Ambrose v. Allen,* 113 Cal. App. 107, a painting contractor who entered a building under construction fell when he deliberately stepped upon a joist which did not have sufficient support under it. In *Royal Insurance Co. v. Mazzei,* 50 Cal. App. (2d) 549, a truck was deliberately driven into defendant's electric wires, which were exposed and obvious to the driver. In *Dingman v. Mattock,* 15 Cal. (2d) 622, a plaintiff sub-contractor with as much knowledge as defendant intentionally stepped upon a plank across a stairwell in a building under construction, which plank broke. In *Jones v. Bridges,* 38 Cal. App. (2d) 341, a customer fell down a stairway leading to a lavatory in a cafe, which stairway and the condition thereof were obvious to the eye. In *Brown v. San Francisco Ball Club,* 99 Cal. App. (2d) 484, a patron at a baseball game who chose to sit outside the protective screen was hit by a baseball. In *Shanley v. American Olive Company,* 185 Cal. 552, a switchman on a train was injured when he deliberately remained

on the side of a car being switched adjacent to defendant's building, the proximity of which was obvious and apparent to him.

These cases are certainly no authority in a situation such as the case at bar, where the Government not only failed to warn plaintiff of hidden dangers known to it or to provide him with a safe place to work, but actually represented something as safe which in fact was dangerous to life and limb.

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(2) APPELLEE WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

On pages 7 to 9 of its brief, appellant argues that White is chargeable with contributory negligence because one of his helpers, Private Lang, pitched or handed to White the dud which exploded. The entire argument is based on a false premise, to-wit, that Lang was the employee of White (Br. p. 12). The contract which White was carrying out was a contract between the Government and Mars Metal Company, White's employer (P. Ex. 1; Tr. pp. 98-99). White was a salesman and buyer for Mars Metal Company (Tr. p. 98). At the time of the accident he was paid a straight salary of $250.00 per month (Tr. p. 178) and he had no financial interest in the contract (Tr. p. 169). He merely engaged Lang and other off-duty personnel, with the consent of their superior officers, to help him collect the metal for Mars Metal Company (Tr. p. 64). Lang and the other helpers were there-

fore sub-agents of White and not his employees. In California, the sub-agent (Lang) represents the principal (Mars Metal Co.) and not the original agent (White). White, therefore, was not responsible for Lang's acts:

Cal. Civil Code, Sec. 2351;
Barton v. McDermott, 108 Cal. App. 372, 385;
Shannon v. Fleishhacker, 116 Cal. App. 258, 264.

Even were the California rule otherwise, appellant would be in no better position, because there is nothing whatsoever in the record to indicate that Private Lang was negligent.

Appellant's argument is based solely and only on an alleged admission of Lang contained in "Defendant's Exhibit D" (Br. p. 8), but this exhibit, being palpable hearsay, was marked for identification only and excluded from the record (Tr. pp. 296; 306). The gratuitous statements of counsel that Lang was skilled in matters of ammunition and knew of the existence of duds in the strafing range (Br. pp. 7-8) find no support in the record. Actually, Lang did nothing more than pick up what looked like a harmless solid iron 37mm. projectile of the type Sergeant Hodges had said would be found on the strafing range, and hand the same to White (Tr. p. 209). In fact, Sergeant Hodges saw White's helpers, including Lang, on the strafing range, and watched with approval the procedure that was being used (Tr. p. 118). White naturally would assume that what was safe for army per-

sonnel was safe for him. Thus, there is no evidence that either Lang or White was guilty of any negligence, contributory or otherwise.

The trial court's finding that White was not guilty of contributory negligence is therefore fully supported by the record (Tr. p. 69).

---

(3) THERE WAS NO INTERVENING CAUSE CUTTING OFF APPELLANT'S LIABILITY TO WHITE.

The District Court found that the act of Lang in handing or tossing the projectile to White was a normal and natural incident to the collection of scrap metal and therefore foreseeable by the Government; hence, Lang's conduct did not in any way constitute an intervening cause relieving the Government of liability to White (Tr. p. 68).

This finding is attacked on pages 9 to 12 of appellant's brief, not on the basis of anything in the record, but rather on certain arbitrary and unfounded assumptions of counsel.

First, it is assumed that Lang was guilty of negligence in that he *knowingly* tossed an unexploded shell to White "with complete disregard for the welfare of himself and his employer" (Br. p. 10). Of course, there is nothing in the record to support such a fantastic claim. We have already seen that Lang merely picked up what appeared to be a harmless solid iron 37mm. projectile of the type Sergeant Hodges said would be found on the strafing range, and handed the

same to White with an inquiry as to whether White was interested therein (Tr. p. 209). White did not have time to grasp the explosive firmly or inspect the same. It was in his hand but a fraction of a second (Tr. pp. 210-211). Lang had no more knowledge of danger than White. His act was free from negligence, and obviously free from any deliberate intent to harm either himself or others.

Even were we to assume that Lang was somehow negligent in failing to detect the danger, nevertheless his act of handing the projectile to White was a natural and foreseeable one, as the trial court found (Tr. p. 68). In the collection of scrap metal, what is more natural or foreseeable than for the helper, untrained in the metal business, to consult from time to time with his foreman as to the kind of scrap metal he wished to collect? The rule of *Northwestern National Insurance Co. v. Rogers Pattern & Aluminum Foundry,* 73 Cal. App. (2d) 442, wherein a hearing was denied by the California Supreme Court, governs such a situation. In that case, the defendants negligently shipped magnesium instead of aluminum castings to North American Co., whose general manager *negligently* immersed the same in sodium nitrate, causing an explosion. The general manager actually saw that the color of some of the castings differed from the color of other castings in the shipment and observed the difference in the weight of the castings from those previously received. Concerning a claim that the negligent acts of the manager constituted an

independent intervening cause cutting off defendants' liability, the court said:

> "This proposition is untenable since the law is settled in California that an intervening act of a third person, negligent in itself, is not a superseding cause of injury to another which the actor's negligent conduct is a substantial factor in bringing about, if (1) the actor at the time of his negligent conduct should have realized that a third person might so act, or (2) a reasonably prudent man knowing the existing situation when the act of the third person was done would not regard it as *highly extraordinary* that the third person should so act. (*Mosley v. Arden Farms Co.,* 26 Cal. (2d) 213, 219. See, also, *Lacy v. Pacific Gas & Electric Co.,* 220 Cal. 97, 98; *Herron v. Smith Brothers, Inc.,* 116 Cal. App. 518, 521; *Restatement of the Law,* vol. II, Torts (Negligence), p. 1196, § 447.)"
>
> (p. 444.)

The present case is far stronger than the *Northwestern National Insurance* case because there the court *assumed* that the general manager, or intervening party, was negligent. Certainly no such assumption can be made in regard to Private Lang's conduct. And his conduct was certainly not "highly extraordinary."

Second, appellant assumes that the act of Lang and not the prior negligence of appellant, is the sole proximate cause of White's injuries (Br. pp. 10-11). This is not the law. The basic and fundamental negligence in this case is the failure of the Government to

maintain a safe place in which White could carry out the contract and to take such precautions as necessary to find and remove duds from the place where he was to work. This negligence continued prior to the time White and his fellow-workers entered the range until the very moment of explosion. Even had Lang been proved negligent, nevertheless such negligence would merely have concurred with the basic original negligence of the Government to cause the explosion. The two concurring acts, under California law, would then constitute the proximate cause of the injury. The rule is stated in *Rae v. California Equipment Co.,* 12 Cal. (2d) 563, quoting from *Lacy v. Pac. Gas & Elec. Co.,* 220 Cal. 97, 98, as follows:

> "The authorities in this state hold that where the original negligence continues and exists up to the time of the injury, the concurrent negligent act of a third person causing the injury will not be regarded as an independent act of negligence, but the two concurring acts of negligence will be held to be the proximate cause of the injury."
>
> (p. 570.)

This rule is clearly illustrated by one of the very cases cited by appellant (Br. p. 11), *Stewart v. United States,* 186 Fed. (2d) 627 (7th Circ.). In that case some children were injured by the explosion of a smoke grenade which had been removed from Fort Sheridan, Illinois, by three high school boys who scaled a wire fence and trespassed on the reservation. The court first distinguished and disapproved of the case of *Schmidt v. United States,* 179 Fed. (2d) 724

(10th Circ.), also cited by appellant (Br. p. 11), wherein the father of children employed by a contractor to remove hay from the military reservation at Fort Riley, Kansas, found some bazooka shells which he thought were harmless and which he took home with him. The children played with the shells and the injuries followed. The *Stewart* case pointed out that the *Schmidt* case was decided by a divided court under very narrow Kansas law and involved the act of a mature man who committed trespass by removing the shells from the reservation, which acts were unforeseeable, and therefore constituted an intervening cause. The court then stated that under applicable Illinois law, where high explosives are involved, the courts "will not look too narrowly for independent causes intervening between the injury and the original negligence in keeping" (p. 634). The court said:

> "That the Government negligently permitted a situation fraught with great danger is hardly open to doubt, and that the intervening act which it relies upon as an avenue of escape from its negligence might reasonably have been apprehended is also clear. Such being the case, its negligence contributed to the injuries complained of and must be regarded as the proximate cause."
>
> (p. 634.)

Nor is there anything to the contrary in the third and last case cited by appellant (Br. p. 11), *Hauser v. Pacific Gas & Electric Co.*, 133 Cal. App. 222, where the operator of a hay derrick deliberately and knowingly caused the boom thereof to contact defendant's

high tension power line. The case correctly held that *no negligence whatsoever* by defendant was either alleged or proved.

Thus, under no conceivable interpretation could Lang's conduct be held an intervening cause exempting the Government from liability. This was well stated by the trial court as follows:

> "The fact that soldiers employed by plaintiff, himself, participated in the scrap collecting and that one of them handed or tossed the fatal dud to plaintiff is immaterial so far as freeing defendant from liability. Such conduct on the part of the military personnel did not give rise to the status of an intervening cause so as to cut off defendant's liability. The conduct in question was usual and expected under the circumstances and merely made possible the explosion caused by defendant's own negligence in failing to clear the range or, in the alternative, safely marking it for those engaged in collecting scrap. Rae v. California Equipment Co., 12 C. 2d 563. Cf. Stewart v. United States, 186 F. 2d 627."
>
> (Opinion of District Court, Tr. p. 42.)

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(4) WHITE DID NOT ASSUME THE RISK OF THIS EXPLOSION.

The District Court found that White did not assume the risk of the explosion (Tr. p. 69). Appellant claims that the findings are erroneous (Br. pp. 19-22). The basis of this claim is a statement that White must have known of the danger because he was warned of

the same (Br. p. 20). As we have already seen, the evidence is to the direct contrary. Let us now show just how appellant has misinterpreted or misstated the testimony to support this argument:

(a) Appellant says that Sergeant Hodges warned White "of the existence of duds or explosives in the area of the strafing range" (Br. p. 19). This is absolutely untrue. Hodges pointed out one marked 75mm. artillery dud which he called a "freak" because the strafing range was not an area where such shells normally fell (Tr. pp. 107; 197). Hodges represented this range to be otherwise safe and free from duds (Tr. pp. 107; 109; 213). Appellant tries to insinuate that Hodges showed White dangerous explosives likely to be encountered (Br. p. 19), but the only thing shown White was a harmless solid iron 37mm. projectile, which unfortunately resembled the 37mm. anti-personnel projectile which caused the explosion (Tr. pp. 105; 209).

(b) Appellant says that Captain Jones "warned appellee of the possibility of unexploded shells on the ranges" (Br. p. 20). But we have already seen that Jones' warning was confined to the *artillery impact areas* many miles from the strafing range and in which White was not interested (Tr. pp. 256-257; 265; 292). Respecting the *strafing range,* Jones warned of *one marked artillery dud,* but of nothing else (Tr. pp. 113; 195-196.)

(c) Appellant says that Captain Pitre, the contracting officer, warned White of possible danger on the

strafing range, citing defendant's exhibit "I" (Br. p. 20). This exhibit was not admitted in evidence, as appellant now concedes (Supp. Br. p. 2). Actually, the record affirmatively shows that Captain Pitre failed to warn White of any danger on the strafing range (Tr. pp. 110-111).

(d) Appellant says that White himself admitted a knowledge of duds on the strafing range (Br. pp. 20, 21). This fantastic conclusion is drawn by ignoring all of White's trial testimony and actually misquoting from a statement given by White in the Army Hospital five days following the explosion (Def's Ex. A). Appellant quotes White as saying "I knew there were 'duds' out there" (Br. p. 20). What White actually said in this statement was:

> "I explained to the men that I wanted the empty cartridges, that I knew there were *two duds* out there, but to leave them alone, skirt them, * * *"
>
> (Def's Exhibit "A".)

White obviously was referring to *marked* duds which had been pointed out to him, not to *unmarked* duds. As previously pointed out, White took great precautions in avoiding any danger to himself and his helpers from *marked* duds.

(e) Appellant argues that the huge, marked 75mm. artillery dud (the "freak") so resembled the 37mm. anti-personnel dud which exploded as to constitute fair warning to White, because both had "a small piece of gilding metal" on them (Br. p. 21). Appellant

is confused in that the gilding metal was on the non-explosive 37mm. projectiles shown White by Hodges, not on the 75mm. marked dud (Tr. p. 105). Not only is there no evidence whatsoever that the 75mm. dud had any gilding metal on it, but the comparison is otherwise so absurd as to require no further comment.

(f) Appellant again refers to the warning signs allegedly posted at Camp Beale (Br. p. 21). We have already seen however, that these signs were merely warnings to the *general public* that they were entering upon the firing range area and should stay on the traveled roads (Tr. pp. 266-267), and constituted no warning whatsoever to a business invitee.

(g) Appellant places some reliance upon the fact that the contract between White's employer and the Government provided for the sale of scrap metal on a "where is" basis and allowed White's employer to be the sole judge of the areas to be worked (Br. p. 20). Clearly, the mere fact that White's employer undertook under the contract to collect the scrap metal and was given the discretion to determine from what ranges it would gather the metal, did not mean that White's employer had contracted away the duty of due care owed to it and its employees as business invitees.

The question of knowledge and appreciation of danger are matters for the determination of the trial court (*DeGraf v. Anglo California National Bank,* 14 Cal. (2d) 87, 100; *Meindersee v. Meyers,* 188 Cal. 498, 502). The trial court could reach but one possible

conclusion in this case. White was assured that, except for the marked dud pointed out to him, the strafing range was free of explosives and a safe place on which to work. He therefore could not possibly have "assumed the risk" of the existence of a deadly projectile or hazard of which he had no conceivable knowledge. The court in *DeGraf v. Anglo California National Bank,* supra, stated the rule as follows:

> "And before it can be said that one has 'assumed the risk' of a specified hazard, it must be shown that he had knowledge of the condition creating the hazard. One does not assume the risks of danger which he has no reason to anticipate (*Williamson v. Fitzgerald,* 116 Cal. App. 19.)"
>
> (p. 100.)

Similarly, in *Claypool v. United States,* 98 Fed. Supp. 702 (Cal.), a Federal Tort Claims Act case, the court stated:

> "On the question of assumption of risk, it is our view that the risk was a concealed one, and that plaintiff, not knowing of any risk, could not assume one. Further, the language of the brochure, itself, is sufficient to cause those visiting the camp to believe they will be safe in camping out provided they observe the regulations. Were the statements in the brochure not sufficient certainly the information or lack of information given by the Park Rangers in answer to plaintiff's inquiries served to give him a sense of security from danger."
>
> (p. 704.)

The rule is illustrated by several of the very cases cited by appellant (Br. p. 22). Thus, in *Weaver v. Shell Oil Co.,* 34 Cal. App. (2d) 713, plaintiff was held not to have assumed the risk of an explosion of gasoline delivered to an underground tank on his employer's premises where he had no prior knowledge of possible danger therefrom. *Zeisemer v. McCarty,* 71 Cal. App. (2d) 378, held that plaintiff building superintendent did not assume the risk of injury sustained during the delivery of lumber to the project on which he was working where he had no knowledge of any danger. *Hayes v. Richfield Oil Corp.,* 38 Cal. (2d) 375, held that plaintiff patron did not assume the risk of a fall into a hidden grease pit at defendant's service station. *Bazzoli v. Nance's Sanitorium,* 109 Cal. App. (2d) 232, held that a business invitee to defendant's premises did not assume the risk of falling through a defective floor, the danger of which was unknown to plaintiff.

The remaining cases cited by appellant (Br. p. 22) involved fact situations totally inapplicable here. Thus, in *Gleason v. Fire Protection Engineering Co.,* 127 Cal. App. 754, an employee sent to cover a hole in a leaking roof, deliberately grasped a wet and slippery rope, and as a consequence fell through an exposed skylight clearly apparent to his eye. He was properly held to be guilty of contributory negligence as a matter of law. In *Grassie v. American LaFrance Fire Engine Co.,* 95 Cal. App. 384, a guest on a fire engine was properly held to have assumed the risk of in-

juries sustained during a test run where he knew that the engine was going to make a run just as though going to a real fire, and where he also knew the condition of the streets over which the run was to be made. In *Goetz v. Hydraulic Press Brick Co.,* 320 Mo. 580, 9 S.W. (2d) 606, the court correctly held that a miner who saw an open box of dynamite, watched a hot piece of steel strike the wall immediately above it, but nevertheless chose to remain on the premises after he had ample time to leave in safety, assumed the risk of the inevitable explosion which followed.

There is an insinuation or suggestion by appellant that the collection of scrap metal from a strafing range is an ultra-hazardous pursuit, and a business invitee, while so engaged, should not be permitted to recover, regardless of how culpable the land owner's conduct may be (Br. p. 21). This line of reasoning is difficult to understand. If the Government had rendered the strafing range safe by use of proper detecting and de-dudding equipment, the collection of scrap metal from a strafing range would be no more dangerous than the collection of metal from any other location. If the Government had even given White the information it possessed, or had properly warned him, he could have refused to go on the range. But the Government chose to represent something as safe which in fact it knew was highly dangerous, and nevertheless now argues that White "assumed the risk" of the trap into which he was lured.

(5) NEGLIGENCE BY PARTICULAR AGENTS OF THE GOVERNMENT ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT WAS CLEARLY DEMONSTRATED IN THIS CASE.

Appellant advances the novel argument (Br. pp. 12-16) that there can be no liability under the Federal Tort Claims Act unless a *particular* Government employee was shown to have been negligent. This argument is apparently based by appellant on some language in one of the three opinions rendered by a divided court in *Texas City Disaster Litigation,* 197 Fed. (2d) 771 (5th Circ.) and in *Lauterbach v. United States,* 95 Fed. Supp. 479 (Wash.) (Br. p. 13). The *Texas City* litigation involved alleged negligence in executing the Wartime Fertilizer Program, while the *Lauterbach* case involved alleged negligent operation of Bonneville Dam. Neither case was concerned with the duties of a landowner to a business invitee, and since no negligence by *anybody* was found in either case, they throw little, if any, light on the case at bar.

An Army installation such as Camp Beale *must,* of necessity, be operated and maintained by Army personnel. If it is negligently maintained, it must be the negligence of such personnel. Unless the Government shows intervention or control by unauthorized third parties, any other result would be impossible. No such intervention or control was shown in this case. Therefore, the trial court specifically found that all of the acts of negligence, misrepresentation and neglect were acts by agents, servants, and employees of defendant United States of America act-

ing within the course and scope of their employment (Finding XIII, Tr. pp. 68-69).

The law governing such situations under the Federal Tort Claims Act was first enunciated by Chief Judge Magruder in *United States v. Hull,* 195 Fed. (2d) 64 (1st Circ.), where plaintiff sustained injuries due to negligent maintenance of a post office window. The court held (a) that it was unnecessary under the Act for plaintiff to show negligence of a *specific* employee, and (b) the Government may be liable under the Act for nonfeasance as well as misfeasance.

The opinion was followed in *Jackson v. United States,* 196 Fed. (2d) 725 (3rd Circ.), where plaintiff sustained injuries in falling on post office steps. The court said:

> "We think it obvious that the Government can only act through the agency of some human being. The statute in so many words says, in imposing liability, 'personal injury * * * caused by the negligent or wrongful act or omission of any employee of the Government * * *' The maintenance of post office property in an unreasonably dangerous condition is just as much the negligent omission of an employee of the Government as is the failure to heed a stop sign by the driver of a mail truck."
>
> (p. 726.)

In *Blaine v. United States,* 102 Fed. Supp. 161 (Tenn.), where plaintiff fell on a defective sidewalk adjacent to a Government building, the court said:

> "Whether this duty of inspection and maintenance was reposed wholly in the postmaster would not seem to be decisively material. The duty rested somewhere, for the sovereign functions only through agents. Realty is not an active instrumentality, requiring manipulation, but is passive, requiring maintenance, or the lack of it, as the source of misfeasance. For that reason it is difficult, if not impossible, to identify a particular individual as the sole tort feasor."
>
> (p. 165.)

The cases cited by appellant (Br. pp. 14-15) in no way derogate from this rule. In *United States v. Campbell,* 172 Fed. Rep. (2d) 500 (5th Circ.), the plaintiff was negligently hit by a sailor running to catch a train. Since there was no evidence that the sailor was acting under orders at the time, it could not be said he was acting within the scope of his employment. In *United States v. Eleazer,* 177 Fed. (2d) 914 (4th Circ.), plaintiff was injured when an automobile driven by a Marine lieutenant collided with his automobile. At the time, the lieutenant was on his way home for the enjoyment of a deferred leave. The court properly held that the lieutenant was not acting within the scope of his office or employment. In *Denney v. United States,* 185 Fed. (2d) 108 (10th Circ.), the trial court found no negligence by the Government where an exposed shell exploded on an isolated target range on which mature high school boys had trespassed. The boys deliberately caused the shell to explode. The appellate court held that it was

bound by this finding and that, under these circumstances, the mere presence of an unexploded shell on the range or a failure to warn or deactivate the same, was not negligence as a matter of law. The court distinguished the case from the facts in *Beasley v. United States,* 81 Fed. Supp. 518 (So. Car.), which involved injuries through the explosion of projectiles on a military reservation, and in which the court laid down the following rule:

> "If the official in charge of a Government reservation leaves explosives or other dangerous instrumentalities around where the public *visits and is invited,* his employer, the Government, is held liable."
>
> (p. 529.)

In *Madden v. United States,* 76 Fed. Supp. 41 (Fla.), the Government was absolved from liability where a child ran into the side of an Army truck.

So we see that the law does not require the injured party to identify the *particular* negligent agent in the case of negligently maintained or operated property. But even if it did, appellant would be in no better position for the simple reason that White *did identify* every responsible negligent agent: (a) Captain Robert Sumner Jones, the Post Range Officer in charge of the strafing range, who failed to warn White of the impending dangers or to even tell him of the findings of his survey; (b) Sergeant Frank C. Hodges, the Range Sergeant under Jones' supervision, who represented the strafing range to be absolutely safe (the

statement of Hodges on which appellants originally relied and which is referred to on page 15 of appellant's opening brief is now conceded (Supp. Br. p. 2) to have been erroneously admitted in evidence, and therefore constitutes no part of the record); and (c) Captain Charles D. Pitre, the contracting officer, who failed to warn White of *any* danger.

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(6) PROPER DECONTAMINATION OF THE STRAFING RANGE WAS NOT A DISCRETIONARY ACT RELIEVING THE GOVERNMENT OF LIABILITY FOR NEGLIGENCE OR MISREPRESENTATION.

We have already seen that the Government was guilty of many acts of negligence, and even misrepresentation, as to the condition of the strafing range. Appellant argues that the Government is absolved from all liability because the decontamination of the range was a "discretionary function" (28 U.S.C.A. Sec. 2680(a)) within the meaning of the Federal Tort Claims Act (Br. pp. 16-18). In support of this contention, appellant originally relied upon the answers to interrogatories of Captain Pitre (Br. p. 17), but appellant now concedes (Supp. Br. p. 2) that these answers were part of the inadmissible exhibit "I" and states that its argument "stands or falls upon the contents of War Department Circular I-195" (Pl. Ex. 12; Supp. Br. p. 4). Let us accept this challenge and direct our attention to the circular in question.

The circular, as appears in paragraph 1 thereof, relates to the placing of former Army installations in a surplus category for possible release or return to civilian use. It does *not* concern the duties of the responsible officers of an operative Army installation to a business invitee performing a contract with the Government. The trial court recognized this distinction when the circular was first offered in evidence (Tr. pp. 216-217). At that time, counsel for the Government concurred in the court's views and said: "I do not think it is material" (Tr. p. 217).

Even if the circular were material, it has been completely misconstrued by appellant. True, the circular says that it is the obligation of the War Department in the interests of the United States to restore as much land as possible "by locating and removing or neutralizing, so far as practicable, all explosives which remain thereon." If impracticable to so restore, then such areas are to be "appropriately posted or other safety measures will be undertaken * * *" The circular does *not* say that areas with known duds thereon should nevertheless be released to civilian use. In fact, it categorically declares that *"any* unexploded ammunition or duds which remain on these lands will render them *unfit* for civilian use unless the areas are *neutralized* to remove *any possible danger* to persons, animals, or personal property. * * * In the change of status of such areas or ranges from active to inactive or surplus, *persistent and continuous attention* will be given by the installation or tactical commander to

the examination and policing of such areas, to the end that they are *free* of *all* explosive material. * * * The responsible commander will ascertain that any area to be recommended as being no longer required is *free of any element* which may be dangerous to civilian occupany at a later date."

The Government actually has no right to argue this point because the defense is not pleaded. The court in *Boyce v. United States,* 93 Fed. Supp. 866 (Iowa), said:

> "Unless the pleadings show upon their face the applicability of the 'discretionary function' exception contained in Section 2680 (a), the same must be raised by way of an affirmative defense and the burden, therefore, devolves upon the Government to establish its applicability".
>
> (p. 868.)

In any event, appellant has misinterpreted the meaning of the words "discretionary function" as used in the Federal Tort Claims Act. Where the law gives a Government official the choice or discretion of pursuing or not pursuing a certain policy, the courts historically have refused to interfere with the exercise of such executive discretion. The Act preserves this historical immunity. But once the choice or discretion has been exercised, the chosen policy cannot be executed in a negligent, wrongful, or criminal manner.

Here, the War Department had a choice or discretion as to whether scrap metal on strafing ranges should or should not be sold for profit. Once having

decided to do so, the Government was then obligated to the business invitee performing the contract to the same extent as "a private person * * * in accordance with the law of the place where the act or omission occurred" (28 USCA, § 1346 (b)).

For example, in *Somerset Seafood Co. v. United States,* 193 Fed. (2d) 631 (4th Circ.), where the Government was held liable under the Federal Tort Claims Act for the negligent marking of a wrecked vessel, the Government argued that this was a "discretionary function" within Section 2680 (a) of the Act. The court rejected this argument and said:

> "Even if the decision to mark or remove the wreck be regarded as discretionary, there is liability for negligence in marking *after* the discretion has been exercised and the decision to mark has been made. There is certainly no discretion to mark a wreck in such a way as to constitute a trap for the ignorant or unwary rather than a warning of danger."
>
> (p. 635.)

Similarly, in *Costley v. United States,* 181 Fed. (2d) 723 (5th Circ.), where the Government was held liable for the negligent treatment of a sergeant's wife in an Army hospital, the court said that once the Government had exercised its discretion to admit the wife, it could not treat her in a negligent manner.

To the same effect, see: *Dishman v. United States,* 93 Fed. Supp. 567 (Md.), and *Toledo v. United States,* 95 Fed. Supp. 838 (Puerto Rico), one of the cases cited by appellant (Br. p. 18).

There is nothing to the contrary in any of the other cases cited by appellant (Br. p. 18). In *Kendrick v. United States,* 82 Fed. Supp. 430 (Ala.), the court very properly held that the Government was not liable because the Veterans Administration exercised its discretion strictly according to the regulations and released a veteran, who subsequently killed someone. *North v. United States,* 94 Fed. Supp. 824 (Utah), held that the Department of Interior was not liable for exercising its discretion by constructing a dam in accordance with law, merely because the dam *might* have interfered with the flow of underground waters under plaintiff's land. Similarly, *Coates v. United States,* 181 Fed. Rep. (2d) 816 (8th Circ.), held that the Government was not liable for exercising its discretion in accordance with the law by changing the course of the Missouri River pursuant to the Missouri River Control Program over a twenty-year period, even though this may have interfered with the water flow on plaintiff's land. *Old King Coal Co. v. United States,* 88 Fed. Supp. 124 (Iowa), was an action to recover for loss allegedly suffered by reason of a coal mine not being operated after it had been taken over by the Secretary of the Interior under Executive Order of the President. The court correctly held that the Secretary of the Interior had the discretion in the furtherance of the war effort to either operate or not to operate the mine under these circumstances.

When an Army installation is placed in the hands of Government officials, they have no "discretion" whether they shall maintain the same in a safe and

proper manner. If a business invitee is brought on the premises by the Government, certainly they have no "discretion" in respect to their duties to such invitee. If the law were otherwise, there could be no recovery in any case involving the negligent maintenance or operation of a military installation, however wanton, reckless, or criminal the conduct of Army personnel might be.

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(7) THE INDUSTRIAL INDEMNITY COMPANY, SUBROGEE, IS ENTITLED TO RECOGNITION OF ITS CLAIM OF LIEN.

On pages 28 and 29 of its brief, appellant argues that The Industrial Indemnity Company is not entitled to recognition of its claim of lien and supplemental claim of lien in the net amount of $3722.11 for medical, hospital and other expenditures made on behalf of White. Appellant says that *United States v. Aetna Casualty & Insurance Company,* 338 U.S. 366, 94 L. Ed. 171, 70 Sup. Ct. 207, held that an insurance carrier may not share in any judgment as subrogee under the Federal Claims Act unless it is a formal party plaintiff (Br. p. 28). This is incorrect. The *Aetna* case held for the first time that an insurance carrier was entitled to sue in its own name as a party plaintiff for the *entire* claim to which it was partially subrogated. The court also pointed out that the insured could likewise sue in his own name for all the damages, or that the Government could, if so disposed, compel joinder of both by timely motion, even though both are not "indispensable" parties. The case did *not* hold that an insurance carrier could not share in

a judgment in any way unless made a formal party plaintiff, nor was that an issue in the case.

There are other cogent reasons why the *Aetna* case is no authority here: The plaintiff in this case is not the insurance company but John Phillip White, the injured party. He brought suit for *all* damages sustained, including the medical and hospital expenses paid for him by The Industrial Indemnity Company (Br. pp. 46-51). During the trial, counsel for White advised the court that they likewise represented The Industrial Indemnity Company to the extent of its subrogated claim (Tr. p. 217). In respect to this claim, counsel for the Government stipulated that the medical and hospital payments were made by the insurance company on behalf of White and that they were reasonable in amount (Tr. pp. 222-223). The sole objection of the Government attorney at that time was stated by him as follows:

> "I do not think the court can award a judgment to Mr. White because he has not paid these bills * * *"
>
> (Tr. p. 219.)

In this respect, counsel was wrong, because it is clear that the injured party may sue for *all* damages, regardless of who pays the same:

United States v. Aetna Casualty & Insurance Company, supra;

United States v. State Road Department, 189 Fed. (2d) 591 (5th Circ.);

Gray v. United States, 77 Fed. Supp. 869 (Mass.).

Nevertheless, out of an abundance of caution and to meet this objection, a formal claim of lien was filed on behalf of The Industrial Indemnity Company, in accordance with California practice (Calif. Labor Code, § 3856), and White consented thereto by endorsement on the face of the claim (Tr. pp. 37-39; 220). The Government could have compelled the joinder of the insurance company as a party (*Aetna Casualty* case), but did not choose to do so.

When the case was reopened on the question of damages, the insurance carrier filed a supplemental claim of lien covering the stipulated (Tr. pp. 320-321) expenses paid for White since the original trial, and White again affixed his consent thereto (Tr. pp. 44-45). At this time, appellant's counsel waived all objections to this procedure, and stated:

> "*No objection,* with the supplemental claim of lien, Your Honor * * * I also advised the Court at the time they filed the original claim of lien, and I think the Court overruled me, *rather properly.* Outside of that, *I have no objection.*"
>
> (Tr. p. 321.)

The case was thereafter reopened for the purpose of assisting the court in the formulation of its judgment by the introduction in evidence of the letter of agreement between the insurance company, the insured, and their attorneys (Tr. pp. 56-58). Once again, the Government tendered no objection (Tr. pp. 353-355).

The District Court then proceeded to recognize the interest of the insurance company in its findings of fact (Tr. pp. 73-74) and in the preamble to its formal judgment (Tr. pp. 78-81), which judgment was approved as to form by the Government (Tr. p. 82). *But the judgment itself, to the extent of the total award of $55,081.19 was given to plaintiff John Phillip White, and to no one else* (Tr. p. 80). The attorneys and the insurance company were then recognized as to their respective interests in the judgment, in accordance with the consent of White (Tr. pp. 80-81).

The Federal Courts have similarly protected the interest of insurance companies *even where a formal claim of lien has not been filed.* In *Gray v. United States,* 77 Fed. Supp. 869 (Mass.), the court said that the insured party should recover the full amount, but should hold the insurance company's interest as trustee. In *Grace to the use of Grangers Mutual Insurance Co. v. United States,* 76 Fed. Supp. 174 (Md.), the court approved the use of the old equity practice established by *United States v. American Tobacco Co.,* 166 U.S. 468, 474, 17 Sup. Ct. 619, 41 L. Ed. 1081, by impressing the insurer's interest with a trust. In *Marino v. United States,* 84 Fed. Supp. 721 (N.Y.), the court awarded $20,000 damages to the injured plaintiff and suggested that "suitable provision be included" in the judgment to reimburse the insurer for the $5,029.62 expended on plaintiff's behalf.

In this case the trial court was clearly advised of the respective interests of the injured party and the insurance carrier-subrogee. These interests were formally made a part of the record of this case. The judgment does no more than provide for payment in accordance with these respective interests, as to which there was no dispute. By so doing, there was no conceivable prejudice to the Government, nor does appellant claim such prejudice on this appeal. The judgment, as entered, preserves the rights of all interested parties in one proceeding in a simple, practical and common-sense manner.

CONCLUSION.

In essence this is not a complicated case. We have the unfortunate situation where the owner or operator of land invites a business invitee on his premises for their mutual profit, represents the area as safe, fails to render the area safe or to properly inspect the same in order to ascertain potential danger, and neglects to give warning of the danger likely to be encountered. Under applicable California law which here governs, this is negligence. The situation is aggravated, not only because of the grievous injuries which resulted, but also because the Government had knowledge of the very danger encountered, but refused to eliminate the same for the reason that the potential cost was too great. The Federal Tort Claims Act makes the Government liable under applicable

local law wherever a private individual would be liable. Clearly, a private individual or corporation would be liable to a business invitee under the circumstances of this case.

Dated, San Francisco, California,
January 14, 1953.

Respectfully submitted,
LEONARD J. BLOOM,
M. S. HUBERMAN,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

Title 28 U.S.C.A. Section 1346 (b) reads as follows:

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Title 28 U.S.C.A. Section 2671 reads as follows:

"As used in the chapter and sections 1346 (b) and 2401 (b) of this title, the term—

'Federal agency' includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and

persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in line of duty. June 25, 1948, c. 646, 62 Stat. 982, amended May 24, 1949, c. 139, § 124, 63 Stat. 106."

Title 28 U.S.C.A. Section 2674 reads in part as follows:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

Title 28 U.S.C.A. Section 2680 reads in part as follows:

"The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

No. 13,226

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

JOHN PHILLIP WHITE,
Appellee.

APPELLANT'S REPLY BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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APPELLANT'S REPLY BRIEF.

STATEMENT.

Appellant at this time is taking the opportunity to answer and refute several of the arguments that appellee has raised in his brief. Appellant in this Reply Brief does not intend to answer all the points argued by the appellee. However, the government desires to specifically reply to several points raised by the appellee which are clearly contrary to the specifications of points relied upon on appeal as set forth in appellant's opening brief.

As to those points in appellee's brief that are not answered or replied to herein it is respectfully submitted that the appellant does not acquiesce or agree with the contentions or arguments of appellee as set

forth therein. As to those unanswered arguments, appellant relies upon its authorities and arguments as set forth in its opening brief.

WAS APPELLEE GUILTY OF CONTRIBUTORY NEGLIGENCE?

Appellant in its opening brief (Br. pp. 7-9) has asserted that the appellee in the instant case was guilty of contributory negligence and the contributory negligence on his part barred his recovery in the instant litigation. Appellee quite naturally has denied this contention on the part of the government (Br. pp. 15-17). Appellee asserts that he could not be guilty of contributory negligence by way of imputation from Pvt. Lang by reason of the fact that Pvt. Lang, although hired by Mr. White, was in fact not responsible to Mr. White but to appellee's employer, MARS METAL COMPANY. In support of this contention, appellee has cited section 2351 of the California Civil Code (Br. p. 16). Appellant in support of its position that Lang was an employee of White and, therefore, the negligence of Lang was imputed to White, respectfully directs the attention of the Honorable Court to the fact that appellee by his own testimony never disclosed to Lang or any other member of the military personnel whom he hired that he was working for the Mars Metal Company. The Court's attention is directed to the testimony of the appellee as follows:

> "I went to town and bought two sacks. I spoke to the executive officer telling him *I* was going

> to have to employ people and was there any objection to *my* hiring soldiers on their off time." (Tr. 113)

Appellee in his brief contends that his hiring of off duty personnel was for and in behalf of his employer (Br. p. 15). This assertion is inferential and not substantiated by the evidence and clearly contrary to the testimony of the appellee as set forth above. The evidence clearly discloses that White and White alone was doing the hiring of the military personnel to aid him in the collection of the scrap metal. The evidence is likewise lacking of any disclosures by White to these soldiers that he was working in behalf of another person or company. The Court's attention is respectfully directed to 61 ALR at pages 281-282 in the discussion of the agent's liability for acts of a subagent. The text states:

> "But, if the agent, having undertaken to do the *business* of his principle *employs* a servant or agent *on his own account to assist him* in what he has undertaken such a subagent is the *agent* of the agent and is responsible to the agent for his conduct and the agent is responsible to the principle for the manner in which the business is done." (Emphasis added.)

In accord with this principle, the record is clear that White was undertaking to do the business of his employer, Mars Metal Company. He employed Lang to assist him in removing scrap metal from the Camp Beale strafing range. In effect, this hiring resulted in Lang becoming an agent of White and

under the authority set forth in appellant's opening brief (Br. p. 89) the negligence of Lang was imputed to appellee barring his recovery in the instant action.

We must reassert our contention that the conduct of Lang towards White was negligent, irrespective of the argument to the contrary by appellee's brief (Br. pp. 15-17). The appellant's position is that Lang was negligent in the manner in which he handled the chunk of iron with White in close proximity is based upon the appellant's own testimony (Tr. pp. 121-122). This testimony of the appellee shows that White did not want the piece of metal, and so told Lang. Lang while he was "walking off" from White, "nevertheless * * * pitched" it at him. It is inconceivable to the appellant that this conduct of Lang was anything but negligent. When White told Lang that he did not want the metal that had been shown to him that should have ended the discussion. Lang had no further cause or reason to thereafter give the metal to White. Yet, after having been told that the metal was not of the type desired by the appellee, Lang pitched or tossed the metal to White while "walking off" from White (Tr. p. 122). Such conduct was not prudent on the part of Lang and his actions most assuredly were not motivated by a person having due concern for the safety and well-being of White, who was in close proximity to him.

We cannot agree with the trial Court's findings that such conduct on Lang's part was a normal or natural incident to the collection of scrap metal (Tr. p. 68). We must respectfully differ with this finding

and again reassert our position that Lang's conduct was negligent and being imputed to White on the basis of Lang acting as White's agent, constituted contributory negligence on the part of White barring recovery in the instant action.

WAS THE ACT OF LANG AN INTERVENING CAUSE?

Appellee in his brief (Br. pp. 17-22) goes into great length in asserting the negative of this proposition. The appellant cannot agree with this contention of the appellee. Likewise, appellant is not in accord with the trial Court's finding that no intervening cause arose relieving the United States of America from liability to appellee (Tr. p. 68 and Tr. p. 76). The appellee in his brief (Br. pp. 17-18) states with emphasis that Lang *handed* the 37 mm. projectile to White, citing appellee's testimony to that effect (Tr. p. 209). This assertion by the appellee is incomplete for the testimony of the appellee shows that Pvt. Lang either handed it or *tossed* it and White *"attempted to catch it as you would anything that is pitched to you or thrown to you."* (Tr. p. 209). It is clear from the testimony of the appellee himself that his argument that Lang handed the piece of metal to him is contrary to the evidence that Lang in fact threw the piece of metal at the appellee, while he was walking off from White (Tr. p. 122). Appellee in his brief has cited the case of *Northwestern National Insurance Company v. Rogers Pattern Aluminum Foundry,* 73 Cal. App. (2d) 442

as authority to refute appellant's argument that Lang's conduct towards White was an intervening cause relieving appellant from liability arising out of any negligence on the government's part, if any there was. Appellee has referred to the Court's decision in the *Northwestern National Insurance Company case* to uphold his position that the actions of Lang did not constitute an intervening cause because the appellant:

1. Should have realized that Lang might act as he did; and,

2. That appellant should not have regarded Lang's act as *highly extraordinary* under the then existing situation.

To say the least, Lang's conduct in tossing or pitching the chunk of iron at appellee after being told by White that he did not want the metal in question was anything but an ordinary act and was in fact conduct that was extremely and highly extraordinary.

Reasonably prudent individuals are not to be held to the foreseeability that people collecting scrap metal will toss it at one another after being told that the metal in question was not acceptable. From the evidence, it is clear that the appellant should not be held to the legal duty of realizing or anticipating that Lang would act as he did. Such a standard of care and foreseeability is untenable. Appellant must reassert its argument that the act of Pvt. Lang in tossing or pitching the metal to appellee actually operated to produce appellee's injuries, irrespective of whether

appellant was negligent or not prior thereto. (Rest. Torts, Sec. 441.)

Provin v. Continental Oil Company, 49 Cal. App. (2d) 417 at 424.

CONCLUSION.

In conclusion, appellant respectfully submits that contrary to the arguments of appellee, the Findings of Fact, the Conclusions of Law and the Judgment rendered by the Honorable Trial Court Judge are not in accordance with the facts of the law in this case, are set forth and argued by appellant in this closing brief and in its opening brief heretofore filed. It is respectfully submitted that the Judgment of the Trial Court in favor of the appellee should be reversed and an Order made and entered by this Appellate Tribunal entering judgment for and in favor of appellant.

Dated, San Francisco, California,
February 20, 1953.

Respectfully submitted,

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